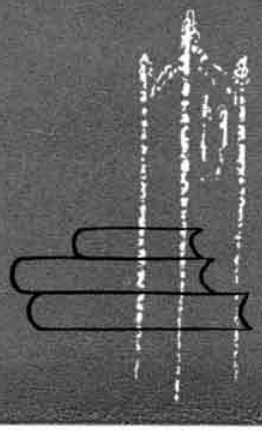
Fall 9-1-1958

Law School Record, vol. 8, no. 1 Special Supplement (Fall 1958)

Law School Record Editors

THE UNIVERSITY OF CHICAGO

The Law School Record
Special Supplement



Volume 8 *Autumn 1958* *Number 1*

Last August, the Conference of Chief Justices adopted a report of its committee on "Federal-State Relationships as Affected by Judicial Decisions." The Chairman of that committee was the Honorable Frederick W. Brune, Chief Judge of Maryland. The report contains the following foreword:

"Your Committee on Federal-State Relationships as Affected by Judicial Decisions was appointed pursuant to action taken at the 1957 meeting of the Conference, at which, you will recall, there was some discussion of recent decisions of the Supreme Court of the United States and a Resolution expressing concern with regard thereto was adopted by the Conference. This Committee held a meeting in Washington in December, 1957, at which plans for conducting our work were developed. This meeting was attended by Sidney Spector of the Council of State Governments and by Professor Philip B. Kurland, of the University of Chicago Law School.

The Committee believed that it would be desirable to survey this field from the point of view of general trends rather than by attempting to submit detailed analyses of many cases. It was realized, however, that an expert survey of recent Supreme Court decisions within the area under consideration would be highly desirable in order that we might have the benefit in drafting this report of scholarly research and of competent analysis and appraisal, as well as of objectivity of approach.

Thanks to Professor Kurland and to four of his colleagues of the faculty of the University of Chicago Law School several monographs dealing with subjects within the Committee's field of action have been prepared and have been furnished to all members of the Committee and of the Conference. These monographs and their authors are as follows:

1. "The Supreme Court, The Due Process Clause, and the In Personam Jurisdiction of State Courts" by Professor Kurland;
2. "Limitations on State Power to Deal with Issues of Subversion and Loyalty" by Assistant Professor Roger C. Cramton;
3. "Congress, the States and Commerce" by Professor Allison Dunham;
4. "The Supreme Court, Federalism, and State Systems of Criminal Justice" by Professor Francis A. Allen; and
5. "The Supreme Court, the Congress and State Jurisdiction Over Labor Relations," by Professor Bernard D. Meltzer.

These gentlemen have devoted much time, study and thought to the preparation of very scholarly, interesting and instructive monographs on the above subjects. We wish to express our deep appreciation to each of them for his very thorough research and analysis of these problems. With the pressure of the work of our respective courts, the members of this Committee could not have undertaken this research work and we could scarcely have hoped, even with ample time, to equal the thorough and excellent reports which they have written on their respective subjects.

It had originally been hoped that all necessary research material would be available to your Committee by the end of April and that the Committee could study it and then meet for discussion, possibly late in May, and thereafter send at least a draft of the Committee's report to the members of the Conference well in advance of the 1958 meeting; but these hopes have not been realized. The magnitude of the studies and the thoroughness with which they have been made rendered it impossible to complete them until about two months after the original target date and it has been impracticable to hold another meeting of this Committee until the time of the Conference.

Even after this unavoidable delay had developed, there was a plan to have these papers presented at a Seminar to be held at the University of Chicago late in June. Unfortunately, this plan could not be carried through, either. We hope, however, that these papers may be published in the near future with such changes and additions as the several authors may wish to make in them. Some will undoubtedly be desired in order to include decisions of the Supreme Court in some cases which are referred to in these monographs, but in which decisions were rendered after the monographs had been prepared. Each of the monographs

as transmitted to us is stated to be in preliminary form and subject to change and as not being for publication. Much as we are indebted to Professor Kurland and his colleagues for their invaluable research aid, your Committee must accept sole responsibility for the views herein stated. Unfortunately, it is impracticable to include all or even a substantial part of their analyses in this report."

In addition, the Conference passed a Resolution of Appreciation to Professor Kurland and the Law School of the University of Chicago in the following language:

"RESOLUTION OF APPRECIATION

The Conference particularly extends its appreciation:

To Professor Philip B. Kurland and the Law School of the University of Chicago.

The Conference of Chief Justices extends to Professor Philip B. Kurland of the University of Chicago Law School its profound thanks for his scholarly and painstaking work as consultant to the Conference of Chief Justices Committee on Federal-State Relationships as Affected by Judicial Decisions.

It further extends its appreciation to Professor Kurland and to Professor Allison Dunham for their excellent talks on federal-state relations to the Conference. Their presence and remarks were of the highest importance in this matter of vital interest to the Conference.

The Conference further extends its appreciation to the members of the faculty of the Law School of the University of Chicago who prepared scholarly research documents which were of inestimable value to the Committee in the preparation of its own report."

The papers prepared for the Conference by the members of the Faculty of The University of Chicago Law School are reprinted, with revisions, with this issue of the *Record* as a special supplement. The talks given at the Conference by Professors Dunham and Kurland are also included.

CONTENTS

The Supreme Court, Federalism, and State Systems of Criminal Justice

By FRANCIS A. ALLEN
Professor of Law,
The University of Chicago Law School

The history of the administration of criminal justice in the United States, like that of other governmental functions of a dynamic society, is characterized by flux and change. For present purposes only two aspects of growth and development require identification. First, there has been a spectacular increase in the number and types of functions delegated to American systems of criminal justice.[1] This, among other reasons, has led to progressively greater complexity in the operation of the systems. Second, American criminal justice has increasingly felt the impact of federal power in the day-by-day functioning of the systems. At times these two factors have been confused. What is sometimes taken as evidence of a redistribution of power between the states and the federal government is, in fact, simply a manisfestation of greater governmental activity in the criminal area at both the state and federal levels. Nevertheless, it is true that the enhancement of the relative importance of the federal government in many aspects of criminal-law administration is one of the most significant developments in the recent history of criminal justice in America.

The purpose of this paper is to describe the role of the Supreme Court of the United States in the development of federal power as it relates to the criminal law and its administration. It is well at the outset, however, to recognize that the new interest of the Court in state criminal procedure is one, and only one, of the factors that has led to the present importance of federal power in the field. From the very beginning of our national life, state and federal systems of law enforcement have been brought into frequent contact.[2] In the first half of the nineteenth century, for example, the impact of the federal fugitive-slave legislation on state law enforcement was sharp and, sometimes, painful.[3] But the most significant developments occurred in the present century in the form of congressional enactments. Thus, in rapid succession, Congress adopted such laws as the Mann Act,[4] the Harrison Act,[5] the Dyer Act,[6] the Lindbergh Law,[7] the Fugitives from Justice Act,[8] and many others. This legislation, in the most direct and significant fashion, introduced federal personnel and federal power into the area of even routine law-enforcement. While the Supreme Court has consistently upheld the validity of such statutes,[9] the initiative for these developments came from Congress, not the Court. And there have been other sorts of federal influence in the field. The importance of training programs for state police officers, conducted by such agencies as the Federal Bureau of Investigation and the Narcotics Bureau, and the service functions of federal agencies, such as the maintenance of fingerprint files and scientific aids to detection available to state law enforcement, should not be underestimated. The net result of these federal activities has been to render wholly inadequate the traditional concept of rigid separation of federal and state powers in criminal-law enforcement. On the contrary, a new system of cooperative federalism has appeared, the full significance of which has not been grasped by the public at large and, indeed, has only begun to be appreciated by many persons professionally engaged in law-enforcement functions. The complex of state, local and federal powers that characterizes American law-enforcement has never been fully or accurately delineated in the literature of the field.[10] It is not my purpose to undertake such a description. One general assertion, however, seems entirely justified. It is that many of the factors leading to the new importance of the federal government in the administration of criminal justice are attributable only remotely to the Supreme Court and, with reference to other factors, the Court has made no significant contribution whatever.

The Law before Powell v. Alabama[11]

This is, however, not to deny the importance of modern constitutional law involving the validity of state criminal procedure under the due process clause of the Fourteenth Amendment. One of the most striking aspects of federal judicial supervision of state criminal justice is the recent and rapid expansion of constitutional doctrine in the field. These developments may be said to date from the decision of the Court in the case of *Powell v. Alabama*,[12] decided in 1932, or, at the earliest, the case of *Moore v. Dempsey*,[13] decided in 1923. Since that time the Court has spoken to a host of issues involving the fairness of state criminal process in its various aspects.[14] It would, of course, be overstatement to assert that the law of state criminal procedure has become a branch of federal constitutional law. Nevertheless, it is true that many of the most important issues in the field have been articulated in the language of due process, and that state systems of criminal justice are today confronted by a catalogue of constitutional restraints

hardly contemplated as recently as a generation ago. Nor should it be assumed that this remarkable development of constitutional doctrine has been the work of a little coterie of like-minded judges. For the fact is that since the decision of *Powell v. Alabama,* twenty-six justices appointed by eight Presidents of the United States have sat on the Supreme Court.[15] Without doubt, a wide range of attitudes and viewpoints has been represented. Despite this diversity, the expansion of doctrine has, on the whole, moved steadily forward.

To understand the historical importance of *Powell v. Alabama,* it is necessary to look to the constitutional law as it related to state criminal procedures before that decision. Very early in our history the Court, in *Cohens v. Virginia,* established its jurisdiction to review state criminal convictions when federal questions are in issue.[16] But before the adoption of the Fourteenth Amendment in 1868, the occasions to exercise this jurisdiction were few. Only a few cases involving the *ex post facto,* bill of attainder, and extradition clauses came before the Supreme Court.[17] Nor was federal judicial supervision quickly expanded following the adoption of the Fourteenth Amendment. It was not until 1880, with the decision of *Strauder v. West Virginia*[18] and *Ex Parte Virginia,*[19] that the provisions of the Amendment were first applied against procedures of state criminal justice. But these cases, containing the first announcement of the principle forbidding discriminatory selection of jury panels, did not rest on the due process clause. For many years following the adoption of the Fourteenth Amendment almost all the actual restraints imposed on the states by the Court in the criminal area were in cases involving sections of the Constitution which antedated the amendment. In a rather long series of cases, for example, the Court was called upon to apply the *ex post facto* clause to state legislation, which it did, sometimes with great rigor.[20] Cases involving extradition and interstate rendition were numerous.[21] The law relating to the availability of federal habeas corpus to persons in state custody began its tortuous and complex development.[22]

But throughout this long period, well into the twentieth century, the due process clause played no significant role. This was not because counsel representing state prisoners did not invoke the clause, for from the mid-eighties on numerous due process claims were advanced.[23] Almost without exception these assertions were rejected, even at the time when the Court was most vigorously applying the due process clause to regulate and limit state experiments in economic and social legislation.[24] All of the great cases of this period involving the application of the due process clause to state criminal procedures left the states substantially free from federal judicial supervision.[25] The short of the matter is that, if one puts aside a series of decisions in which provisions of a state anti-trust statute were declared void for uncertainty,[26] it is substantially accurate to say that not until 1923 and the decision of *Moore v. Dempsey*[27]—the habeas corpus case involving allegations of mob domination of the state trial—does the due process clause become an effective device for the regulation of state criminal process. Not until *Powell v. Alabama,*[28] decided in 1932, almost sixty-five years after the adoption of the Fourteenth Amendment, does the modern law of the area really commence.

When such an event as the decision of *Powell v. Alabama* occurs in constitutional history, it is perhaps not entirely without profit to speculate as to the reasons for the phenomenon. No doubt, the question can never be fully or satisfactorily answered in any ultimate sense. But partial explanations have been advanced. Some observers of the Court have pointed to the fact that the *Powell* case was decided near the end of the Prohibition era. There is no doubt that the prohibition experiment raised the issues of crime and law enforcement to a level of national attention never before attained. One manifestation of this concern was the appearance, beginning in the 1920s, of a series of local, state and national surveys of criminal-law administration.[29] Much of the attention of those who prepared the early crime surveys was directed to questions of "efficiency" in law enforcement.[30] But, particularly, the significant Report of the Wickersham Commission[31] with its focus on "Lawlessness in Law Enforcement" directed attention to problems of a different sort, problems that were seriously to engage the attention of the Supreme Court for the next quarter-century. Another suggestion relates *Powell* and the subsequent development of doctrine to the reform of the Court's jurisdiction in 1925.[32] The Court, it is asserted, was willing to embark upon the review of state criminal cases because, for the first time, it felt it could control its docket, a result attainable under its discretionary certiorari jurisdiction but impossible under the old writ of error practice.[33] If this was the calculation of the Court it can only be observed that the expectation has not been fully realized. Finally, it is worth noting that a principle, once articulated by the Court, may have a life of its own, in some measure independent of external pressures and considerations. To say the least, *Powell v. Alabama* contained the seeds of growth.

But these explanations, with their varying degrees of cogency, are hardly satisfying. Perhaps it may be worth observing that the decision of the *Powell* case and the rise of Hitler to power in Germany occurred within the period of a single year. It would, of course,

be facile and specious to suggest that these two events are related by any direct causal connection. Yet, perhaps, in some larger sense the two occurrences may be located in the same current of history. Both events are encompassed in the crisis of individual liberty which has confronted the western world since the first world war. The Court has been sensitive to the crisis and has responded emphatically to it. It is not only in the state criminal cases that Constitutional doctrine has expanded at a remarkable rate. Virtually all of the law of free speech, assembly and press, for example, has been articulated in the last forty years.[34] When viewed against a background of such momentous events a little criminal case involving the misbehavior of local police officers may take on a peculiar significance. It is precisely here that the Court's role in the criminal cases has come under vigorous attack. The complaint has been that the Court has frequently become so entangled in the great issues of personal liberty that it often has failed to see the concrete case before it.[35] No doubt, it would be possible to point to particular decisions in which this criticism appears to be well justified. However this may be, it is apparent that the Court has seen the state criminal cases as one aspect of the modern problem of individual liberty. What the Court has done can only be understood in this light.

The Federal Constitutional Law of State Criminal Procedure: A Survey

(1) *The content of due process.* The modern constitutional law of state criminal procedure is, for most practical purposes, the law of the Fourteenth Amendment. More specifically, apart from a few areas in which the equal protection clause has played a significant role, it is the law of due process. It need hardly be asserted that for the last three-quarters of a century the interpretation and application of the due process clause of the Fourteenth Amendment has been one of the most important preoccupations of the United States Supreme Court. The criminal cases form only one part of this history.

The law of due process does not, of course, begin with the Fourteenth Amendment. A due process clause was included in the Fifth Amendment, and similar language may be found in many of the state constitutions which antedated the Fourteenth Amendment. While the due process cases decided before the Civil War are not without modern interest and significance,[36] they can hardly be regarded as of crucial importance in the solution of contemporary problems. The initial reaction of the majority of the Court to the due process clause was to confine it within very narrow limitations.[37] But, as is well known, this attitude was discarded in the 1880's, and the modern law of the Fourteenth Amendment may be dated from that time.[38]

Nevertheless, even though it be true that the state criminal cases form part of the larger history of the due process clause, it is also true that the law of due process in the criminal cases has its distinctive aspects. When language possesses the extreme generality of that of the Fourteenth Amendment, it is inevitable that its interpretation will take on the coloration of the particular problems to which it is applied. It is possible to identify various approaches and criteria of interpretation in the criminal cases. While none of these may be said to be peculiar to these cases, some are of more importance to the criminal cases than to other areas of due process litigation.

One concept that appears clearly in the earliest decisions involving the due process clause and state criminal procedure is the notion that the states are to be left a wide area of freedom to experiment with new procedural devices and that, within very broad limitations, local policy in the criminal area is to be permitted expression. The Fourteenth Amendment, according to this view, was not intended to create a revolution in the relations between the states and the federal government. Thus, Mr. Justice Matthews, speaking for the Court in *Hurtado v. California,* says: "There is nothing in Magna Charta, rightly construed as a broad charter of public rights and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted."[39] But this was not meant to suggest that historical experience as reflected in the common law is irrelevant in determining the content of due process, for in many of the criminal cases,[40] as well as in others,[41] this appeal to history has been made.

Perhaps the best modern example of conflicting approaches in determining the content of due process is afforded by the case of *Adamson v. California.*[42] The question involved the validity of a provision of the California constitution that permits the judge and prosecutor to call to the jury's attention the failure of the defendant to take the stand in his own defense.[43] The position of the four dissenting justices was that the states, by virtue of the due process clause, the privileges and immunities clause, or the entire first section of the Fourteenth Amendment, are subject to all the limitations of the Bill of Rights, including the privilege against self-incrimination recognized in the Fifth Amendment, and that, accordingly, the California provision must be deemed void.

The contention of the dissenting judges, although it has never gained the acceptance of a majority of the

Court, has a long history. In *Barron v. Baltimore*,[44] Chief Justice Marshall, speaking for the Court, announced the proposition that the provisions of the first nine amendments to the Constitution are applicable only to Congress and the federal government. Although the propriety of the *Barron* decision has been challenged by certain modern scholars,[45] no member of the Court appears to have doubted its authority. But in the generation following the adoption of the Fourteenth Amendment, the argument was advanced that the first section of that Amendment "incorporated" the limitations of the Bill of Rights and made them binding on the states. This was the position of the elder Mr. Justice Harlan in his well-known dissenting opinions in *Maxwell v. Dow*[46] and *Twining v. New Jersey*.[47] Harlan's position was resurrected by a minority of the modern Court, and in the *Adamson* case it missed acceptance by the narrow margin of a single vote.

The position of the prevailing justices in the *Adamson* case is a reaffirmation of the traditional formula that has evolved from the Court's deliberations since decision of the earliest cases involving the validity of state criminal process: Whether state action is to be deemed offensive to the due process clause of the Fourteenth Amendment is to be determined, not by reference to the provisions of the Bill of Rights, but by reference to a particular inquiry. That inquiry is whether the right asserted and claimed to have been denied is one that may be deemed "basic to a free society."[48] The formula presupposes a broad area of discretion in the states. It represents a striking example of the explicit recognition by the Supreme Court of the obligations imposed on it by a system that divides political authority between state and national governments.

Although echoes of the *Adamson* controversy are still heard in recent cases,[49] a serious revival of the broad issue of constitutional doctrine presented by that case seems hardly likely in the immediate future. But the continued recognition of the "rights basic to a free society" formula does not, to say the least, put an end to the difficulties of supplying content to the phrase "due process of law." There are few concrete cases that are determined simply by a recital of that formula. The application of the formula contemplates an exercise of judgment; and judgments are variable. Certain questions arise. What are the "rights basic to a free society" and how may they be determined? Of what significance is the fact that a given procedure is consistent with the prevailing practices of the states and of the "English-speaking nations"?[50] What is the significance of common-law precedent and analogy? The due process cases are characterized by the tension of competing considerations. There are few areas in which this tension is greater than in the criminal cases, for in few areas are interests of such immediate and obvious importance found in such sharp opposition.

In the paragraphs that follow a canvass is made of some of the particular problems that have confronted the Court in recent years. The enormous range of issues to be found in the state criminal cases makes impossible even an approach to a complete survey within the confines of a single paper. An effort has been made, however, to select for discussion those questions of the greatest intrinsic importance and which, at the same time, are most revealing of the modern Court's role.

(2) *Rights of counsel.* Perhaps the most important group of cases involving state criminal procedures are those presenting the issue of rights of counsel. This is true whether attention is directed to the development of due process theory in the criminal area or to the practical problems that have been encountered in recent years, not only by the Supreme Court of the United States, but by state and lower federal courts, as well.

Significantly enough, the modern law of due process relating to criminal procedure begins with a case posing questions of the right of counsel, *Powell v. Alabama*.[51] The importance of the decision warrants particular attention. Nine illiterate young Negroes were arrested and charged with rape, a capital offense. They were tried in three separate proceedings. The juries found each guilty of the offense and imposed upon each the sentence of death. The defendants were not represented by counsel of their own choice. Instead, at the arraignment the trial judge "appointed" all members of the local bar to represent them. The defense actually afforded was desultory and was based on no substantial pre-trial investigation.

The decision of the Court in reversing the conviction is stated in the alternative. Mr. Justice Sutherland, for the Court, found that defendants' federal rights were invaded in that no adequate opportunity was afforded defendants, who were tried far from home in a strange community, to secure counsel to represent them, and in that, assuming their inability to procure counsel of their own choice, they were denied a fair hearing by the failure of the trial judge to provide defendants the "effective assistance of counsel." The trial court's assignment of all the members of the local bar to denfendants' cause was dismissed as little more than "an expansive gesture."[52] No lawyer was given individual responsibility and obligation to assume the burdens of pre-trial investigation or representation in court.

The opinion of Mr. Justice Sutherland affords an excellent example of the operation of the judicial process

in a Fourteenth Amendment case. It is recognized, first of all, that the original understanding of constitutional provisions, such as the language of the Sixth Amendment, which provide for the right of counsel in criminal cases, was not a right in the indigent defendant to demand that a lawyer be appointed in his behalf. Rather, these provisions were probably meant to insure that when a defendant had secured a lawyer to represent him, the latter would be permitted to participate in the proceedings and speak in the defendant's behalf. Lawyers at common law were not permitted full participation in criminal cases. Not until 1836 did England afford full recognition to the defense lawyer's role in felony prosecutions.[53] But the issue here was not the meaning of the right "to have the assistance of counsel in his defense," as that language is employed in the Sixth Amendment.[54] Rather, the issue was what does the requirement of *due process* entail in this case? Whatever that phrase imports, says Mr. Justice Sutherland, it surely includes the concept of notice and hearing in proceedings directed to the life and liberty of persons. And what does a "fair hearing" involve? Mr. Justice Sutherland answers:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[55]

Although the *Powell* opinion is predicated upon a broad theoretical foundation, capable, as events were to prove, of supporting a very much expanded concept of individual right, the actual holding is narrowly limited to the facts of the particular case. "All that is necessary to decide, as we do decide," wrote Justice Sutherland, "is that in a *capital* case, where defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law . . . "[56]

The *Powell* case thus left unresolved a host of issues relating to the rights of the indigent defendant in a state case to secure effective legal representation. For eight years the Court was not to return to these problems, and when it was again confronted by issues of representation in 1940 and 1941, it announced judgments that did not significantly expand or clarify the law as it had been left by the decision of *Powell*. The first of these two cases was *Avery* v. *Alabama*.[57] The issue was whether the failure of a trial judge in a capital case to grant a continuance on motion of defense counsel shortly after his appointment denied defendant the "effective assistance of counsel." A unanimous court affirmed the conviction. It was recognized that denying the lawyer opportunity to consult the accused and prepare a defense might "convert the appointment of counsel into a sham."[58] But the facts of the particular case were found not to bear this interpretation. In *Smith v. O'Grady*[59] the Court held that the allegations of absence of counsel in a non-capital case, together with deliberate trickery on the part of the prosecution to procure a plea of guilty, if established, made out a case of due process denial.

But ten years after the decision of *Powell*, a major chapter of due process law was written by the Court in the case of *Betts v. Brady*.[60] Defendant was brought to trial on a charge of robbery. He asked that counsel be appointed in his behalf, but the request was denied. Thereupon he pleaded not guilty, waived the jury and proceeded to trial. He participated in his own defense, engaging in cross-examination and argument. Ultimately, defendant was convicted and sentenced to eight years' imprisonment. Over the sharp dissent of three justices, the Court affirmed the conviction. The opinion canvasses existing and historical legislative materials relating to rights of counsel of indigent defendants in non-capital cases. It was found that the right was not widely recognized. This demonstrates, says Mr. Justice Roberts for the Court, "that, in the great majority of states it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial."[61] At least in non-capital cases a "flat requirement" of counsel is not part of the Fourteenth Amendment. " . . . while want of counsel in a particular case may result in a conviction lacking such fundamental fairness, we cannot say that the Amendment embraces an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel."[62] Thus, while a defendant is entitled to a "fair hearing," it is not to be assumed that his trial was unfair solely on the ground that he lacked legal rep-

resentation. On the contrary, it must be demonstrated that the absence of counsel deprived him of a fair trial.

The holding of *Betts v. Brady* was unquestionably an event of great significance in the development of due process doctrine. Nevertheless, for five years after the decision, the status of the case as an authoritative precedent was the subject of considerable doubt. During this period a number of cases, some of substantial importance, were decided. None, however, represents a square application of *Betts v. Brady*. Thus, in *Williams v. Kaiser*[63] and *Tomkins v. Missouri*,[64] convictions for offenses punishable by death were reversed on the ground that counsel had not been supplied the accused. In *White v. Ragen*[65] and *Hawk v. Olson*,[66] the Court indicated that allegations in habeas corpus petitions to the effect that the accused were rushed to trial without adequate opportunity to consult with lawyers, made out cases of due process denial. In *Rice v. Olson*[67] the Court disapproved the conclusion of the Nebraska supreme court that a plea of guilty may be taken as a waiver of rights of counsel. "Whatever inference of waiver could be drawn from the petitioner's plea of guilty," said the opinion of the Court, "is adequately answered by the uncontroverted statement in his petition that he did not waive the right either by word or action. The denial of waiver squarely raised a question of fact."[68] In two other cases, however, the Court refused to reverse convictions where there were pleas of guilty and defendants were not represented by lawyers. In both *Carter v. Illinois*[69] and *Foster v. Illinois*,[70] the Court refused to infer a failure of due process simply from the fact that the restricted records, to which review was limited, did not affirmatively show that the trial judge offered to appoint lawyers to represent the defendants.

It is interesting to note that in none of the cases decided between *Betts v. Brady* and *Foster v. Illinois* was the *Betts* case unambiguously cited as a constitutional precedent.[71] There was considerable professional opinion at the time that *Betts v. Brady* was being gradually superseded by a broader rule. On the other hand, the decision in none of the cases of the period was clearly inconsistent with *Betts v. Brady*. Thus, *Williams v. Kaiser* and *Tomkins* were capital cases. *Rice v. Olson* involved a particularly difficult technical problem of state criminal jurisdiction over an Indian reservation. In *De Meerleer v. Michigan*[72] a seventeen year old boy was rushed through a murder trial without counsel and under circumstances rather clearly demonstrating the prejudicial effects of lack of representation. In any event, questions of the continued vitality of *Betts v. Brady* were set to rest by the decision of *Foster v. Illinois* in which the result was expressly made to rest on the *Betts* precedent. The following year, in *Bute v. Illinois*,[73] the majority of the Court, after full-scale reexamination, re-affirmed the *Betts v. Brady* doctrine. In capital cases the states must supply counsel for defendants unable to hire legal representation.[74] But in other cases, however serious, no such requirement is to be recognized. Denial of due process is established only by showing that, under all the circumstances, a "fair trial" was denied.[75] In the intervening years the *Betts-Bute* doctrine has been under fire from a minority of the justices, but to date the lines have held.

The crucial question posed by the Court's counsel rule in the non-capital cases relates to those special circumstances under which want of legal representation may be taken to result in denial of a fair hearing. The problematical nature of the inquiry is well illustrated by a curious pair of cases decided in 1948. Both *Gryger v. Burke*[76] and *Townsend v. Burke*[77] involve contentions that want of counsel at the sentencing stage of the proceedings prejudiced defendants' legitimate interests. In *Gryger* there was some showing that the trial judge, who imposed a life sentence on the defendant as a fourth offender, was under the misapprehension that state law made such a penalty mandatory. Had counsel been present in Gryger's behalf, it was argued, this mistake would have been corrected. In *Townsend*, after orally reviewing defendant's criminal record, the trial judge imposed a long term of imprisonment. In his recital, the trial judge apparently was under the mistaken belief that, as to two charges, Townsend had been convicted when, in fact, he had been acquitted. Again it was argued that had Townsend been represented by counsel, the mistake would have been avoided and the sentence might, therefore, have been less severe. In *Gryger* the Supreme Court denied relief, whereas in *Townsend* those special circumstances indicating denial of fair trial by reason of absence of counsel were found to be present. The distinction is hardly persuasive. Such differences as are present in the two cases cannot easily be conceived as constituting an intelligible line between constitutional procedure and fundamental unfairness.

Other opinions of the Court exemplify the application of the *Betts-Bute* rule in non-capital cases. In *Uveges v. Pennsylvania*,[78] a seventeen-year old boy was permitted to plead guilty to four indictments charging burglary, without advice of counsel. The crimes charged carried a maximum penalty of eighty years. These facts, the youth and inexperience of the accused and the seriousness of the penalties, were held to be sufficient to establish denial of due process. The Court said: "Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or prosecuting

officials, and the complicated nature of the offense charged, and the possible defenses thereto – render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . . the accused must have legal assistance under the Amendment whether he pleads guilty or elects to stand trial, whether he requests counsel or not. Only a waiver of counsel, understandably made, justifies trial without counsel."[79] In *Gibbs v. Burke*,[80] the Court found a denial of due process where, in a larceny prosecution, absence of counsel representing defendants resulted in the admission of improper evidence against the accused and prejudicial conduct on the part of both prosecutor and judge. Again, in *Palmer v. Ashe*,[81] a petition for habeas corpus, although filed eighteen years after conviction, was held sufficient to raise federal questions, where it was alleged that at the trial the accused was in his teens, had a record of mental abnormality, was the victim of deception by the police and was, nevertheless, permitted to enter a guilty plea without advice of counsel. Allegations of unsound mind at the time of trial and absence of counsel were also deemed sufficient by a unanimous court in *Massey v. Moore*.[82] As recently as the 1957 Term, the Court reversed a state conviction in *Moore v. Michigan*,[83] a case involving an unrepresented Negro defendant, seventeen years of age and of limited training and mental capacity. The issue of waiver of counsel sharply divided the Court, the majority holding that under the circumstances, the accused did not freely and understandably waive his right to representation. Not all the cases, of course, have upheld the constitutional claim. An example of the contrary result is *Quicksall v. Michigan*,[84] in which allegations relating to failure of the trial judge to explain the consequences of the guilty plea, denial of opportunity to communicate with friends or lawyer, and the like, were held not to be established by the record.

The cases decided by the Court under the *Betts-Bute* formula are distinguished neither by the consistency of their results nor by the cogency of their argument. The reasons for the announcement of the rule and the Court's subsequent adherence to it, however, are plain. Two considerations are of primary importance. First, the refusal of the Court to impose a "flat requirement" of appointment of counsel in all serious state felony cases, non-capital as well as those in which the death penalty may be imposed, reflects the Court's interpretation of the obligations of federalism. From the decision of *Betts v. Brady* the Court has reaffirmed the necessity of preserving a broad area of discretion in the states with reference to procedures employed to satisfy the counsel requirements. Perhaps the fullest expression of this proposition is in the opinion of Mr. Justice Burton in *Bute v. Illinois*.[85] But there have been many similar statements in other counsel cases.[86] The second consideration is not unrelated: the Court has feared the practical consequences of a "flat requirement" of counsel applicable to all state felony cases. Thus, Mr. Justice Frankfurter specifically adverted to the matter in *Foster v. Illinois:* " . . . such an abrupt innovation as recognition of the constitutional claim here made implies, would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land."[87] Such an objection might be overcome by announcing a broader rule and restricting it to only prospective operation. But this the Court has been understandably reluctant to do.[88]

Nevertheless, the distinction between the capital and non-capital felony cases is difficult to defend. If the rights of counsel are deemed an inherent part of the concept of "fair hearing," as has been consistently asserted by the Court since the *Powell* case, the crucial inquiry would seem to be, not so much the penalties imposed on the defendant upon conviction, but the *need* for skilled representation in the proceedings directed to the establishment of guilt. There is little basis for the belief that trials of capital cases, in general, produce greater need than trials of several other categories of serious, non-capital felonies. Most experienced defense lawyers would probably testify that a murder prosecution, which may result in imposition of the death penalty, is not by any means ordinarily the case most difficult to defend. Indictments charging the accused with such crimes as embezzlement, confidence game, or conspiracy are likely to place the unrepresented defendant in a far more helpless position. The rule, therefore, seems vulnerable to fundamental criticism, and so long as it persists, the law of the subject will remain in a state of unstable equilibrium. In a rather perverse fashion, however, the rule has had results. The very uncertainty as to how long the formula will be recognized by the Court may have been one of the considerations that has led some of the states to expand the rights of counsel by state law well beyond the current federal constitutional minima.[89]

But the law relating to the rights of counsel encompasses more than the claims to appointment of lawyers for impoverished defendants in state felony cases. In the *Powell* case, itself, it was recognized that if the accused has means to hire a lawyer, he has the right to be heard by counsel of his own choosing. This implies that he must be given a reasonable opportunity to retain a lawyer and to consult with him before trial. It was the denial of such a right which induced the reversal of a state court judgment in the recent case of *Chandler v. Fretag*.[90] In the closing weeks of the 1957 term, the Court in three important cases

considered the meaning of rights of counsel in the pre-trial stages of procedure and the relation of those rights to the problem of the "coerced" confession. In *Crooker v. California*,[91] petitioner, who was under sentence of death for murder, complained that his confession, introduced against him at the trial, was obtained while he was held incommunicado by the police and after he had several times requested and been refused the services of an attorney. Petitioner contended that his conviction should be reversed both on the grounds that his rights to counsel of his own choice were denied and that, under these facts, the confession so obtained should be deemed "involuntary." A closely divided court rejected these contentions and affirmed the conviction. The opinion of Mr. Justice Clark for the Court emphasized the facts that petitioner was an educated man with some knowledge of criminal procedure, having completed one year of law study. Whether failure to permit consultation with an attorney at the pre-trial stage is a denial of due process depends not on a "flat requirement" of counsel but on the "special circumstances" of the particular case. Such circumstances, given petitioner's background and experience, were not found to be present in the record under consideration. In a footnote to the opinion[92] it is recognized that this is a capital case and it has been understood that in such cases, counsel must always be appointed or otherwise made available to the defendant without special inquiry as to the prejudicial effects of want of counsel in the particular situation. Mr. Justice Clark denies, however, that the instant holding is in conflict with this understanding, for, it is said, the "flat requirement" of representation in a capital case applies only to the later stages of the criminal proceeding. Be this as it may, it is not clear that the Court's doctrine of "special circumstances," indicating the need for the appointment of counsel at the police-interrogation stage, adds anything to the defendant's rights. For the same circumstances – immaturity, inexperience, mental disorder, and the like–are also relevant in determining the "involuntary" character of the confession. It seems likely, therefore, that *Crooker* leaves to the defendant, subjected to interrogation before his production at the preliminary hearing, only those protections encompassed in the confession rule. This, indeed, seems to be the thrust of Justice Clark's opinion when in rejecting petitioner's contentions it refers to the "devastating effect on enforcement of criminal law [by precluding] police questioning–*fair as well as unfair*–until the accused [is] afforded opportunity to call his attorney."[93] In *Ashdown v. Utah*[94] and *Cicenia v. Lagay*[95] the Court applied the same principles to somewhat comparable situations.

The question of rights of counsel in appellate proceedings has not often engaged the attention of the Court. That some development of doctrine in this area may be forthcoming is suggested by the Court's ruling in *Chessman v. Teets*,[96] decided in June of 1957. The judgment below was vacated on the ground that a lawyer should have been assigned appellant in the state courts to assist in settling a complex record for appeal. Another area of possible development of new doctrine in future years relates to rights of representation in non-criminal or quasi-criminal proceedings. Such rights were recently denied recognition as they related to investigative proceedings conducted by a state fire marshall in the case of *Re Groban*.[97] But there are many other questions of a generally comparable character to which the Court has not yet addressed itself. Juvenile court procedures, for example, may one day present a series of difficult and arresting issues for the Court's consideration.[98]

(3) *The confession cases*.[99] Second in importance only to the counsel cases and of difficulty second to none are the state criminal cases presenting issues of "coerced" or "involuntary" confessions. The law of confessions does not, of course, originate in the Fourteenth Amendment, for the confession rules have their beginnings in the common law.[100] Even the first constitutional cases involving coerced confessions were not decided under the Fourteenth Amendment, for before the first state case, the Court had rendered decisions under the Fifth Amendment.[101]

The central difficulty in the latter-day confession cases centers about a pervasive ambiguity as to the purpose or rationale of the rule requiring the exclusion of coerced confessions from criminal trials. This confusion is not confined to the Fourteenth Amendment cases, but characterizes application of the confession rule throughout its modern history, both in and out of the federal supreme court.

On the one hand, it is asserted that the exclusion of a confession can only be justified when such evidence is rendered unreliable and untrustworthy by virtue of the means employed to procure it, with the result that its admission would create the peril of convicting the innocent.[102] Stated in constitutional terms, predicating a criminal conviction on such evidence denies the defendant a "fair hearing" and thereby operates to deprive the accused of life or liberty without due process of law. This proposition has, on occasion, been expressed by the Court. Thus, in *Lyons v. Oklahoma*, Mr. Justice Reed says: "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture, are not premises from which a civilized forum will infer guilt."[103]

But it appears clear that this rationale is not ade-

quate to explain even the cases decided long before the Court's entry into the field by way of the due process clause. More is involved than the probably "untrustworthiness" of the confession.[104] Thus, generally, the "coerced" confession is held inadmissible despite other evidence strongly corroborating the reliability of the confession.[105] Rather, it has been maintained that the confession rule should be regarded as creating a privilege in behalf of the defendant for the purpose, not simply of excluding unreliable evidence from the trial, but of deterring police officials from employing physical torture and other practices deserving condemnation.[106] This distinction is not merely a verbal one; which approach is employed may determine the outcome of many particular cases.

In the earliest cases arising under the Fourteenth Amendment, however, the ambiguity as to the rationale of the confession rule produced no serious problems. The first of these is *Brown v. Mississippi.*[107] decided in 1936. The case presented a record of the most flagrant physical abuse accompanied by threats of further violence. The issue was drawn by the state in the starkest possible terms, for its brief in the Supreme Court advanced the proposition: "There is nothing in the Federal Constitution which is infringed by the use in state courts of coerced confessions . . . "[108] The conviction was reversed. The cases that immediately followed the *Brown* decision, such as *Chambers v. Florida*[109] and *White v. Texas,*[110] were likewise pervaded by an atmosphere of threats and overt physical violence. So long as the cases coming before the Court were predominantly of this character, a certain ambiguity as to the theory of the confession rule was tolerable. The results could be equally justified whether the Court was principally concerned with the reliability of the confessions as evidence of guilt or whether it conceived the confession rule primarily as a device to discourage and deter such police practices in the future. But when cases involving the more subtle "psychological" pressures began to appear—usually instances of prolonged interrogation—the problem of an intelligble theory of the function of the confession rule became acute. For in the latter cases, unlike those in which overt violence had been employed to induce confession, it was no longer possible easily to assume that the confessions exacted were unreliable as evidence of guilt.

Whatever may be said for the merits of "untrustworthiness" as the exclusive rationale of the confession rule, it has been apparent for a considerable period that it is no longer adequate to explain the cases in the federal Supreme Court. This has been true perhaps as early as the important case of *Ward v. Texas,*[111] decided in 1942. Certainly it has been obvious since 1944 and the decision of *Ashcraft v. Tennessee.*[112] In the latter case a conviction was reversed where a confession had been obtained after some thirty-six hours of continuous interrogation of the defendant by the police. In effect, the Court rule that the extended questioning raised a conclusive presumption of "coercion." Considering the facts as revealed in the record of the *Ashcraft* case, it is fair to suggest that the result reached by the Court reflected less a concern with the reliability of the confession as evidence of guilt in the particular case than disapproval of police methods which a majority of the Court conceived as generally dangerous and subject to serious abuse. The development under consideration was not materially advanced by *Malinski v. New York,*[113] decided the following year, although the case is notable for articulating the proposition that a state conviction must be reversed when a coerced confession was admitted at the trial, even though there be sufficient evidence in the record, apart from the confession, to support the conviction.[114]

It is three cases, decided in 1949, that provide perhaps the best illustration of the attitude of the modern Court in the confession cases. These are *Watts v. Indiana.*[115] *Turner v. Pennsylvania,*[116] and *Harris v. South Carolina.*[117] In none is there any substantial evidence of overt physical brutality on the part of the police. The records, however, show illegal detention, incommunicado confinement, the moving of suspects from place to place during interrogation, and prolonged question. In each case the conviction was reversed. Especially revealing is the opinion of Mr. Justice Frankfurter announcing the judgment of the Court in the *Watts* case. In the course of the opinion such observations as the following are to be found: "Under our system society carries the burden of proving its charge against the accused not out of his own mouth."[118] "Protracted, systematic and uncontrolled subjection of the accused to interrogation by the police for the purpose of eliciting disclosure or confessions is subversive of the accusatorial system. It is the inquisitorial system without its safeguards."[119] And again: "But the history of the criminal law proves overwhelmingly that brutal methods of law enforcement are essentially self-defeating, whatever may be their effect in a particular case."[120]

The decisions of *Stroble v. California*[121] in 1952 and *Stein v. New York*[122] in 1953 suggested, at the time, that the Court might be returning to a narrower conception of the confession rule in state due process cases. In both *Stroble* and *Stein* convictions were affirmed. In the former the result was reached in the face of a determination by the state supreme court that the confession in question was involuntary as a matter of law. *Stein* presents a difficult and technical series of problems relating to the New York proce-

dures which delegate to the jury, determination of the competency of the confession, as well as the general issue of innocence or guilt.[123] But, as later cases were to show, *Stroble* and *Stein* did not result in a permanent change in the Court's position on the confession rules. In the term following the decision of *Stein*, the Court held invalid a New York conviction in which a police psychiatrist had induced a confession from the accused. In reaching its result in *Leyra v. Denno*,[124] the Court proceeded on assumptions that have characterized its decisions since *Ashcraft v. Tennessee*. In *Fikes v. Alabama*,[125] decided in 1957, the Court overturned a state conviction in which there was some evidence that the accused was of low intelligence and that the police had held the defendant in isolation for a week, contrary to state law, and subjected him to numerous periods of interrogation. In reaching its result, the Court reaffirmed its decision in *Turner v. Pennsylvania*.

Five cases involving application of the confession rule were decided in 1958. Three of them – the *Crooker, Cicenia*, and *Ashdown* cases–involved the relation of the confession rule to the rights of counsel and were discussed in the preceding section.[126] The two remaining were *Payne v. Arkansas*[127] and *Thomas v. Arizona*.[128] The *Thomas* case, especially is interesting on its facts; but neither case appears to suggest any significant alterations in the applicable constitutional doctrine.

It is possible to identify a number of crucial assumptions that underlie many of the Court's recent decisions in the confession cases. No particular problem exists when physical force is brought to bear on the suspected person. In the absence of such conduct on the part of the police, a number of factors may be important in the reversal of a state conviction. In *Fikes v. Alabama*, Mr. Chief Justice Warren states as a self-evident proposition: "It is, of course, highly material to the question before the Court to ascertain petitioner's character and background."[129] Thus, the age, experience, education and mental capacity of the subject appear to be conceived as relevant factors in estimating the "overreaching" effect of prolonged interrogation or other police practices short of physical brutality. Perhaps the best example of the effect given to such considerations is the case of *Haley v. Ohio*.[130] The conviction of a fifteen-year-old Negro boy was reversed where the confession followed an arrest at night and five hours of interrogation.

Perhaps even more striking is the hostility revealed by some members of the Court to extended and secret interrogation of suspects by police officials. One of the manifestations of this attitude is the development of the *McNabb* rule,[131] most recently applied in the case of *Mallory v. United States*.[132] That rule, which is applicable only to federal prosecutions, provides that, quite apart from the commands of the Fifth Amendment, confessions are rendered inadmissible if obtained while the suspect is being held in violation of the "speedy-arraignment" provisions of the federal statutes and Rule 5(a) of the Federal Rules of Criminal Procedure. The Court has never applied the *McNabb* rule in state cases arising under the Fourteenth Amendment. Indeed, in *Gallegos v. Nebraska*[133] it expressly held that mere failure to bring the arrested person before a magistrate, as required by state law, does not render the confession inadmissible as a matter of due process. This position has been strengthened by the recent decision of *Crooker v. California*, discussed above. Nevertheless, as long ago as 1942 the Court intimated that unlawfully holding defendant "incommunicado without advice of friends or counsel"[134] might provide basis for reversal of a state conviction. And in a number of other cases such illegal detention has been mentioned as one of the factors, when found in combination with others, that serves to render the confession invalid.[135] The suspicion of secret police interrogation has perhaps been most clearly expressed by Mr. Justice Douglas in his concurring opinion in the *Watts* case: "The procedure breeds coerced confessions. It is the root of the evil. It is the procedure without which the inquisition could not flourish in the country."[136] In this view, secret police interrogation is seen as providing the opportunity and temptation for abuse of suspects by police officials. It produces the inevitable conflicts of testimony between the police and the defendant as to what occurred in the interrogation room. To some members of the Court, the whole process of extended questioning of suspects is basically inconsistent with an "accusatorial" system of criminal justice and subversive of the presumption of innocence. Furthermore, though there has been dissent both on and off the Court, the Court as a whole has proceeded on the assumption that the limitations on the interrogatory practices of the police imposed by some of the recent confession cases need not substantially interfere with the efficiency of law enforcement.[137]

Even apart from questions relating to conflicting conceptions of the purpose of the confession rule, these cases present the Court with certain inherent difficulties. One in particular should be mentioned since it relates directly to the relations between the Supreme Court and the state courts. In the confession cases the Court has consistently taken the view that it is not its function to resolve disputed issues of fact. These, it is said, are matters to be resolved in the state from which the case arises. On the other hand the Court has emphatically asserted that " . . . the question whether there has been a violation of due

process of the Fourteenth Amendment by the introduction of an involuntary confession is one on which we must make an independent determination on the undisputed facts."[138] The basic problem arises from the reality that no neat line exists in this area clearly separating questions of fact and law. The scope of review in many cases, therefore, is almost inevitably the subject of different and conflicting judgments. These disputes continue to characterize many of the Court's decisions.[139]

In the confession cases, as in other areas of due process litigation, a number of unresolved questions may be identified. Thus, under the law of many states a distinction is drawn between the admissibility of "admissions" that are in some sense the product of coercion and the admissibility of involuntary confessions, the former ordinarily being allowed into evidence.[140] In the one case in which the question was put to the Court, it refused to recognize the distinction.[141] The full ramifications of doctrine relating to the question, however, can hardly be regarded as settled. One other such area may be mentioned. Although the state courts have universally accepted the proposition that a "coerced" confession is not admissible at the trial, they have usually held that physical evidence discovered in consequence of such a confession is not to be excluded, if otherwise admissible.[142] Such a result is, of course, in full accord with the "trustworthiness" rationale of the confession rule. The question immediately arises whether such a ruling would survive application of the standards currently recognized by the Court in the confession cases. To date, the issue appears not to have been presented for decision. There is certainly basis to believe that such evidence might be rejected by the Court as the "fruit of the poisonous tree."[143]

(4) *Search and seizure and related matters.* Unlike certain other categories of rights, comparatively few cases have reached the Supreme Court relating to immunity from unreasonable searches and seizures by state officials. Not until 1949 and the case of *Wolf v. Colorado*.[144] was it established that such rights form part of the protections of the due process clause of the Fourteenth Amendment. The *Wolf* case is a particularly interesting example of the tensions produced by the recognition of the objective of fair procedure, on the one hand, and the demands of federalism, on the other. A physician was convicted of conspiracy to commit abortion in the state courts. Before trial, his office was invaded by police on the staff of the local prosecutor. Two appointment books were seized without a warrant of any kind, and the materials so obtained were introduced in evidence at the trial. The state courts clearly recognized that the books had been illegally seized; but since Colorado is one of the jurisdictions not recognizing the exclusionary rule in search and seizure cases, the conviction was affirmed by the state supreme court.

The opinion of Mr. Justice Frankfurter for the Court contains two holdings. First, immunity from unreasonable search and seizure is to be regarded as "implicit in the concept of ordered liberty" and "basic to a free society." Therefore, petitioner's rights under the Fourteenth Amendment were invaded by the seizure of the appointment books. The enforcement of these rights, however, is another matter. Exclusion of evidence illegally seized from the criminal trial, although recognized in the federal courts, has been rejected by two-thirds of the American states and by other English-speaking nations. For this and other reasons, the exclusionary rule is not to be conceived as of "fundamental" importance. Accordingly, the conviction was affirmed.

The practical impact of the *Wolf* case has not been great. A few situations might be conjured up in which the holding would authorize the Court to intervene in state cases. Thus, if a person upon whom the state seeks to impose penalties for resisting a police search defends on the ground that the search was in violation of the Fourteenth Amendment, a reviewable question is, no doubt, raised. A more significant question involves the defendant convicted in a state that has recognized the exclusionary rule. In the event that the state court rules the search in question to be valid and permits the evidence to be admitted, may the defendant challenge the ruling in the federal Supreme Court? The Court has not as yet addressed itself to the problem, although the issue was raised in at least one case in a lower federal court.[145] Another approach was made to the "enforcement" problem in *Stefanelli v. Minard*.[146] There petitioner sought injunctive relief under the Civil Rights Acts in the federal district court, to restrain state officials from introducing evidence in the state courts that had been illegally seized by local police from petitioner's home. The injunction was denied, and, as would be anticipated, the Supreme Court affirmed.

In *Rochin v. California*,[147] state police, without warrant, broke into defendant's home and apprehended him in his bedroom. At the approach of the police, defendant hastily swallowed two capsules containing morphine. Failing in their effort to remove the capsules from Rochin's mouth, the police transported him to a hospital where the capsules were recovered by means of an emetic. The material so procured was introduced as evidence at defendant's trial on a narcotics charge. The conviction was affirmed by a state appellate court. Although the case contained elements of unlawful search and seizure, the Court in reversing the conviction did so without reference to *Wolf v.*

Colorado. Instead, the case is analogized to one involving a coerced confession. Had defendant given a verbal confession as a result of the treatment accorded him by the police, the statement would clearly have been involuntary and its admission at the trial would have required reversal by the Court. The demands of due process are no less when "real," as contrasted to verbal, evidence is so obtained.

Two years later in *Irvine v. California*[148] the Court was called upon to reconcile the scope of its holdings in *Wolf* and *Rochin*. State police, seeking evidence on a gambling charge, made repeated entries into defendant's home and secreted a microphone at various points in the house, including the bedroom. Certain incriminating statements overheard in this fashion were introduced at the trial. A majority of the Court, although expressing shock at the methods employed, affirmed the conviction on the authority of *Wolf v. Colorado*. The *Rochin* case was limited to situations involving physical assaults on the person of the defendant. Mr. Justice Frankfurter, who had spoken for the Court in both *Wolf* and *Rochin*, filed a vigorous dissent. But that the Rochin authority does not invalidate all cases of physical invasion of the person is illustrated by the recent case of *Breithaupt v. Abram*.[149] A conviction for involuntary manslaughter was held consistent with federal due process although at the trial the results of an intoxication test based on a blood sample taken from defendant while he was unconscious were introduced in evidence.

(5) *The jury cases*. The Supreme Court could hardly perform its supervisory functions under the Fourteenth Amendment for any considerable period without encountering problems relating to the jury, an institution of central importance in the criminal process. For over three-quarters of a century the Court has concerned itself with issues concerning the composition of juries and availability of jury trial in the state courts. These cases are interesting both in that they represent the longest sequence of Fourteenth Amendment decisions in the entire criminal area and in that this is the only major category of cases involving state criminal procedure in which the equal protection clause has played an important role.[150]

The most numerous of the jury cases are those involving alleged racial discrimination in the selection of jury panels. Beginning with *Strauder v. West Virginia*[151] *and Ex parte Virginia*,[152] the proposition was established that such exclusion on grounds of race deprived defendants of the equal protection of the laws and that, if properly raised and proved, a showing of this kind provided a basis for reversal of the criminal conviction. Numerous cases posing the issue were decided by the Court in the years following 1880.[153] Despite the long history of such litigation, the number of cases has increased in recent years.[154] These decisions need not be analyzed in detail here. The case of *Cassell v. Texas*,[155] however, is of particular interest since it presents a full-scale discussion of the consequences of proved discrimination in the selection of the grand, as contrasted to the petit, jury. It was the contention of Mr. Justice Jackson in dissent that discrimination at the grand-jury stage should only be regarded as violating rights of the excluded Negroes. So long as the defendant receives a fair trial before a petit jury properly selected, the injury, if any, suffered by him is too speculative and remote to justify a reversal of the conviction. While some other members of the Court expressed sympathy with the Jackson argument, the Court as a whole reaffirmed the proposition that discriminatory selection of the grand jury, as of the petit jury, requires reversal of the criminal conviction.

Not all the issues of discrimination in selection of juries involve alleged exclusions based on race or color. A difficult series of problems was presented to the Court in *Fay v. New York*[156] and *Moore v. New York*,[157] involving the so-called "blue ribbon" jury. Under the provisions of New York law "special jurors" were selected from those already qualifying under the general provisions. It was alleged in the *Fay* case that petitioners had been denied equal protection of the laws on various grounds, including allegations that there was discrimination against certain occupations and income groups in the selection of special jurors, that the special juries were more prone to convict in criminal cases and were employed by the state for this reason, and that the selection of special juries tended to the exclusion of women. The underlying attitude of the majority of the Court is revealed in the statements of Mr. Justice Jackson: "We do not mean that no case or discrimination in jury drawing except those involving race or color can carry such unjust consequences as to amount to a denial of equal protection or due process of law. But we do say that since Congress has considered the specific application of this Amendment to the state jury systems and has found only these discriminations to deserve general legislative condemnation, one who would have the judiciary intervene on grounds not covered by statute must comply with the existing requirements of proving clearly that in his own case the procedure has gone so far afield that its results are a denial of equal protection or due process."[158] A sharply divided court held that the burden so defined had not been successfully borne by petitioners. An interesting problem of equal-protection law was left unresolved: " . . . we need not here decide whether lack of identity with an excluded group would alone

defeat an otherwise well-established case under the Amendment."[159]

The jury cases have also involved application of the due process clause. Indeed, two of the basic interpretations of that clause are in cases dealing with state legislation relating to grand and petit juries. The first is *Hurtado v. California*,[160] one of the earliest and most important opinions on the scope of the due process clause as it relates to state criminal procedure. In that case the Court upheld the validity of a state constitutional provision eliminating the grand jury indictment as a prerequisite to prosecution for murder in the state courts. In the second, *Maxwell v. Dow*,[161] the Court gave equally broad recognition to state powers of experimentation with the jury institution. The opinion affirms the validity of a state provision for eight-man petit juries in non-capital cases and declares that the states "have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict shall be unanimous or not."[162] In addition to these broad issues of state legislative policy the Court has sometimes been confronted by assertions that the character of the jury or the way in which it has been selected has denied defendant a fair trial. Thus, in *Buchalter v. New York*[163] petitioner alleged as error the trial judge's rulings in sustaining challenges for cause by the prosecution and overruling similar challenges by the defense. The result, it was said, was to deny defendant an impartial jury. The Court held that no federal rights had been violated and affirmed the conviction.

(6) *Double jeopardy.* Although rights against multiple trials and double punishments for the same offense play an important role in the historical development of the Anglo-American system of individual liberty, they were slow to receive the attention of the Supreme Court under the Fourteenth Amendment. Even before the end of the nineteenth century, various questions of multiple jeopardy were raised as due process issues by defendants convicted in state courts. The Supreme Court, however, was able to avoid or reserve the question whether such rights form part of the protections of the Amendment.[164] *Palko v. Connecticut*,[165] decided in 1937, appears to be the first full-scale discussion of the problem. The case involves a statutory provision authorizing the state to appeal in a criminal case on the grounds of trial error adverse to prosecution. Defendant was convicted of second-degree murder on an indictment charging first-degree murder. The state appealed and the judgment was reversed. At the new trial defendant was convicted of first-degree murder and sentenced to death. In affirming the latter conviction, the Court conceded that had the case arisen in the federal courts and thus involved application of the double jeopardy provisions of the Fifth Amendment, a contrary result would be required.[166] But in applying the due process clause of the Fourteenth Amendment, a different test must be applied. The question, said the Court, is whether the rights asserted are "implicit in the concept of ordered liberty."[167] So measured, petitioner's constitutional claims were held insufficient to make out a case of denial of federal rights. It is important to observe, however, that the *Palko* case does not hold that no rights against double jeopardy are included within the concept of due process. Thus, the Court says: "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him we have no occasion to consider. We deal with the statute before us and no other. The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error."[168]

Until the last term of the Court the only other state double-jeopardy case of importance is *Brock v. North Carolina*.[169] At the trial two witnesses for the prosecution refused to testify on grounds of self-incrimination. The prosecutor's motion for mistrial was granted and defendant was later tried again and convicted. The Court affirmed the conviction, although there may be reason to doubt that the same result would have been reached had the case arisen under the Fifth Amendment.

Recently the Court has granted certiorari in a number of cases involving issues of double jeopardy. Perhaps the most interesting and important of these is *Bartkus v. Illinois*.[170] Defendant was initially prosecuted and acquitted in the federal court on a charge of violating the federal bank robbery statute. Subsequently, he was convicted of robbery in the state court. There is no doubt that the state conviction is based on the same conduct involved in the federal charge. It has generally been understood, at least since the decision of *United States v. Lanza*,[171] that the protections against double jeopardy do not limit the powers of either state or federal governments to try one who has already been tried in the courts of another jurisdiction for the same act which has violated the laws of each. *Lanza*, however, involved a case in which the defendant had earlier been *convicted* in the state court. Here there had been a prior acquittal. It may be arguable that when an act injures the interests of both state and nation, the person may receive punishments for both injuries, but that

when a person has been tried by a jury and acquitted, he may not be subjected to jeopardy again on the same issues of fact, even in courts of another sovereignty. During the course of the 1957 Term the Court affirmed the *Bartkus* conviction by an equally divided court. But on May 26, 1958, the petition for rehearing was granted[172] and the case was set for argument next term following that of *Abbatte v. United States.*[173] The latter case involves a situation arising out of a labor dispute. Defendants were convicted in a state court of conspiracy to damage certain property of the employer, a telephone company. Later, the defendant was brought to trial and convicted in the federal court of conspiracy to destroy means of communication owned and controlled by the United States. Apparently the same conduct is involved in both prosecutions.

Two other cases involving double jeopardy questions were decided in the 1957 Term. In both, the federal claims were denied and the state convictions affirmed. In *Hoag v. New Jersey*[174] the facts involve a robbery of five men in a tavern. Defendant was apprehended and tried for robbery of three of the five. Only one witness, not one of the three, identified the defendant at the trial. The defense was predicated on alibi and defendant was acquitted. The state then indicted and tried defendant for robbery of the witness who had testified against him at the first trial. He was convicted. In affirming the conviction the Court emphasized that the two trials involved distinct offenses. Even assuming that the doctrine of collateral estopel is required to be recognized by the states in criminal cases, there was nothing, said the Court, to establish that the general verdicts returned in the two trials were based on inconsistent determinations of facts. Finally, in *Ciucci v. Illinois*[175] a conviction was affirmed in a case involving killings of defendant's wife and three children. The state obtained a conviction for the killing of one of the victims, but the jury returned a sentence of only twenty years imprisonment. A second conviction was later received for the killing of another of the victims, the jury imposing a sentence of forty years. A third time defendant was brought to trial and was again convicted of killing still another victim. This time the jury returned a sentence of death. Although evidence of all four killings was introduced in each trial, the Court held that each of the trials was for a distinct offense and within the power of the state to prosecute. Defendant relied in part on certain statements by the prosecutor after the first trial and widely circulated in the daily press, expressing great dissatisfaction with the leniency of the sentence and determination to continue the prosecutions until the death penalty was secured. The Court in a *per curiam* opinion held that these statements were not properly part of the record on review. Two members of the Court strongly suggest, however, that the prosecutor's statements may provide a basis for subsequent collateral attack on the conviction that resulted in the death penalty.[176]

(7) *The concept of fair trial.* In the last quarter century the Court has handed down a large number of cases which cannot conveniently be categorized except as cases contributing to the evolving concept of "fair trial." The decisions, some among the most important rendered by the modern Court, are too numerous to be considered in detail. A brief survey in this area seems necessary, however, to a description of the law of due process as it relates to state criminal procedure.

The concept of notice and hearing necessarily contains the assumption of a tribunal freed from external threats and pressures. Certainly, a proceeding maintained in an atmosphere of violence and threats of physical harm to defendant and the jury should the accused be acquitted, could not be reconciled with the fundamental notions of fairness implicit in the requirements of due process of law. The factual allegations of petitioner in *Moore v. Dempsey,*[177] a case decided at the very beginning of the modern development of the Fourteenth Amendment law in the criminal area, presented an extreme instance of such a situation. Mr. Justice Holmes for the Court stated the applicable principle: Federal judicial power must intervene when "the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the state courts failed to correct the wrong."[178]

The notion of fair trial necessarily presupposes an impartial tribunal, and a conviction before a judge who has a substantial personal stake in the outcome may require reversal by the Court. Thus in *Tumey v. Ohio*[179] conviction for a liquor violation was reversed where the judge was dependent upon fines imposed for his fees, which over a period of time amounted to $100 a month, and where the judge was also mayor of the village and a substantial portion of the budget of local government was met by the collection of such fines. The Court in *Dugan v. Ohio*[180] refused, however, to reverse a conviction where the judge's stake in the outcome was less substantial. Another example of the requirement of an impartial judge is afforded by the case of *Re Murchison.*[181] A judge sitting as a "one-man grand jury" cited defendant for contempt. Later the same judge presided at the trial on the charge. The Court held that the roles of accuser and judge were inconsistent, and the conviction was reversed.

The Court has also taken the position that in a criminal case a "public trial" is ordinarily indispensable

to a fair hearing. In *Gaines v. Washington*[182] it was held that petitioner's allegations of denial of public trial were not supported by the record, and the conviction was left undisturbed. But in *In Re Oliver*[183] a conviction for criminal contempt imposed by a judge acting as a "one-man grand jury" in a secret proceeding, was set aside on due process grounds.

The problem of convictions based in part on perjured testimony has also received the attention of the Court. There appears to be no holding to date invalidating a conviction in a state court on the sole ground that witnesses for the prosecution perjured themselves. But in the well-known case of *Mooney v. Hollohan*[184] the Court in 1935 announced the proposition that the use of perjured testimony by a prosecutor who is aware of the perjury, violates the concept of fundamental fairness. Such allegations are, of course, difficult for the convicted defendant to support successfully.[185] But the principle is firmly established, and as recently as the 1957 Term it was applied to reverse a state conviction in the case of *Alcorta v. Texas*[186].

A final issue of fair trial may be suggested, although to date it has not resulted in reversals of state convictions. The problem is that of the effect of comment by the mass media on the fairness of the criminal trial. The Court has gone very far in depriving the trial judges, both state and federal, of contempt powers to protect the integrity of the judicial process from such threats.[187] These decisions have prompted sharp dissent by a minority of the Court's members. In a number of cases the effect of pre-trial comment on the validity of the criminal conviction has been given consideration. In *Shepherd v. Florida*[188] a conviction was reversed *per curiam* on the ground of discriminatory exclusion of Negroes from the jury. The reversal was supported by Mr. Justice Jackson and Mr. Justice Frankfurter, but their concurrence was predicated on the publication in the newspapers of a statement attributed to the sheriff to the effect that defendant had confessed the killing. No confession was, however, introduced at the trial. "It is hard to imagine," says the concurring opinion, "a more prejudicial influence than a press release by the officer of the court charged with defendant's custody stating that they had confessed, and here such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury."[189]

Among the issues raised unsuccessfully by petitioner in *Stroble v. California*[190] was the effect of allegedly prejudicial statements made by the prosecutor to the press at the pre-trial stages of the proceedings. The majority of the Court held that defendant had not proved actual prejudice and supported their holding by noting that defendant had failed to move for a change of venue. The position of Mr. Justice Frankfurter in dissent is suggested by the statement: "To have the prosecutor himself feed the press with evidence that no self-restrained press ought to publish in anticipation of a trial, is to make the State itself through the prosecutor who wields its power a conscious participant in trial by newspaper, instead of by those methods which centuries of experience have shown to be indispensable to the fair administration of justice."[191] Justice Frankfurter adverted to the same matter in his memorandum opinion accompanying the denial of certiorari in *Leviton v. United States.*[192] Finally, in *United States ex rel. Darcy v. Handy,*[193] decided in 1956, the issue of prejudicial effects of pre-trial newspaper comment was unsuccessfully raised.

Despite the meager results obtained by defendants in raising the issue of "trial by newspaper" the problem cannot safely be dismissed when speculating on the future development of constitutional doctrine in the criminal area. For the injurious effects of pre-trial comment poses a genuine issue of fairness in the criminal process. The present status of the law on the subject, with the requirement of proof of actual prejudice, has, in fact, resulted in no substantial alleviation of the situation. The development of new doctrine requiring reversals of convictions, at least in cases where police and prosecuting officials are the source of the statements given pre-trial publicity, must be regarded as a substantial possibility.[194] The recent *Ciucci* case may provide evidence of such a tendency.[195]

An Appraisal of the Court's Role in the State Criminal Cases

In the last quarter-century, problems of state criminal procedure arising under the due process clause of the Fourteenth Amendment have constituted one of the major preoccupations of the Supreme Court. The Court's role in these cases has been the object of both criticism and approval. A full appraisal of this history would require consideration of materials much more extensive than those compiled in this paper.[196] Nevertheless, certain observations may be offered.

Perhaps the first and most striking fact to emerge from a survey of the Court's opinions in the state criminal cases is the obvious importance of the Court's interpretation of the obligations of federalism in the development of the applicable constitutional doctrine. It is true, as remarked earlier, that the scope of due process law has markedly expanded in the period since the decision of *Powell v. Alabama.* The result, of course, has been a series of limitations on state authority not recognized or even contemplated in the generations preceding that decision. There appears, however, little basis for the view, sometimes expressed,

that the Court has proceeded in the criminal cases oblivious to the claims of state power and state policy. The contrary is more nearly accurate. For no issues in these cases have been more explicity articulated or more hotly contested than the questions involving the division of authority between states and nation. It is worth noting, too, that an accurate representation of the extent to which federal judicial power has intervened in the area of state criminal procedures would require consideration, not only of the cases in which opinions were written, but of those in which the Court refused to exercise its jurisdiction and denied certiorari. Considering the hundreds of petitions for certiorari by state prisoners on the Court's Miscellaneous Docket each term, it is probably accurate to state that the Court has granted review in a smaller fraction of the state criminal cases than in any other major category of constitutional litigation.

The cases under consideration present a great number of specific examples of deference to state authority deriving ultimately from the Court's understanding of the character of American federalism. The Court has, first of all, resisted the effort to impose upon the states the specific limitations of the federal Bill of Rights. From the earliest cases interpreting the due process clause, the Court has recognized that state power and policy must be given wide range for development of procedures consistent with local needs and local conceptions of propriety. The most serious challenge to this traditional understanding was overcome by a majority of the Court in the decision of the *Adamson* case.[197] The result has been the development of a body of constitutional doctrine in many respects quite distinct from that relating to criminal procedures in the federal courts. Thus, a different and less rigorous rule is applied in the state cases relating to the appointment of counsel for indigent defendants.[198] The limitations on state power deriving from the concept of double jeopardy are sharply differentiated from those arising under the Fifth Amendment.[199] State powers of legislative experimentation with the jury institution are in marked contrast to those of Congress.[200] The *McNabb* rule has not been applied to the states,[201] and other exclusionary rules of evidence have been given restricted or no application in the Fourteenth Amendment cases.[202] The privilege against self-incrimination has not as yet been imposed upon the states through the due process clause.[203]

This is, of course, not to say that in all cases the Court has succeeded in giving proper deference and weight to state initiative and discretion. Nor is it to say that the deference shown to state authority has in all respects resulted in sensible doctrine when measured by the needs of the criminal process. The holding of *Wolf v. Colorado*,[204] for example, which recognizes a federal right against unreasonable searches and seizures and, at the same time, denies to federal judicial power the obligation of rendering the right meaningful and effective, is intelligible only by reference to the claims of local policy. Likewise, the distinction between capital cases and other serious felony prosecutions, incorporated in the Fourteenth Amendment law relating to rights of counsel, could hardly have survived except by the force of similar considerations.[205]

If attention is shifted from the areas of state discretion that have survived the new law of due process to the limitations on state authority actually imposed, other aspects of the problems of federalism are revealed. There is no doubt that many particular decisions of the Court resulting in reversals of state convictions are properly subject to criticism on grounds relating to a system of federalism or on other grounds. But if one puts aside consideration and criticism of particular cases, it seems fair to say that the recent law of the Fourteenth Amendment is founded on concepts generally consistent with those principles of decent procedure approved both by state authority and by the community at large. This is most clearly true of the cases involving in-court procedures. That the Court's decisions relating to rights of counsel in criminal cases has not seriously offended local conceptions of propriety is at least suggested by the constructive response at the local level which has resulted in provision for legal aid, in many states, going far beyond the constitutional minima required by the Court. Similarly, it is difficult to believe that there has been anything but general support and approval for the propositions that a local prosecutor may not secure convictions through the knowing use of perjured testimony or that a trial held in an atmosphere of violence and mob domination is no trial at all. The assertion is less clear, however, as it relates to out-of-court practices by police officials, especially the Court's decisions relating to police interrogation and involuntary confessions. Here the conflict between local conceptions of propriety and the Court's insistence on "civilized standards" of police behavior has approached serious proportions. Despite the Court's close attention to these problems, feasible and acceptable solutions have not emerged. Experience would seem to suggest that ultimate resolution of these issues will require legislative consideration.[206]

No precise measure of the impact of the Court's decisions on local law-enforcement practices is available. Obviously, the lines of communication between the courts and the police are dangerously imperfect. There are no data upon which to base an estimate of the Court's influence, if any, on general public at-

titudes toward the issues litigated in the state criminal cases or in the development of what appears to be a quickening public interest in the administration of criminal justice. Nevertheless, the Court's influence on state criminal justice has been substantial. This influence has not been of equal significance in all states or with reference to all issues. But it can fairly be said that the Court has been one of the most important factors in recent efforts at reform of various aspects of American criminal-law administration. It is important to note how this influence has operated. By identifying and dramatizing aspects of the criminal process in a particular state, the Court has often succeeded in opening the way for local legislative action. This is no mere conjecture. The experience in Illinois provides a concrete example. In the course of a decade and a half, these changes, among others, have been produced: Practices relating to the appointment of counsel have been liberalized.[207] Time for filing bills of exceptions in the review process has been extended by rule of the Illinois supreme court.[208] A new statute to meet a critical problem of post-conviction remedies was enacted by the legislature.[209] A rule of the Illinois prison system that barred state prisoners from direct access to the courts was withdrawn.[210] The state supreme court eliminated barriers that blocked impoverished defendants from appellate review of their convictions.[211] It is perfectly clear that all these measures were the direct or indirect product of judicial supervision of Illinois criminal procedures by the United States Supreme Court. It may also be asserted that these alterations in the existing law were necessary and desirable.

The Court has not spoken to all the issues of state criminal justice, nor is it likely that it will. Problems of fairness of procedure in the small-crimes courts have been largely untouched. Practices relating to such quasi-criminal procedures as the sexual psychopath laws[212] or the juvenile courts have been subjected to no real scrutiny. These and many other problems have been left as areas for local determination. There can be no doubt that the Court's role in the state criminal cases has profoundly influenced the structure of American criminal justice. But the essentials of federalism in the criminal area remain intact.

FOOTNOTES

[1] Thus Roscoe Pound has pointed out that "of one hundred thousand persons arrested in Chicago in 1912, more than one-half were held for violation of legal precepts which did not exist twenty-five years before." Pound, Criminal Justice in America (1930) 23. It has also recently been estimated that ". . . the number of crimes for which one may be prosecuted has at least doubled since the turn of the century." Laws, Criminal Courts and Adult Probation, 3 NPPA Jour. 354 (1957).

[2] One of the first acts of the first Congress provided: "That it is recommended to the Legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols to receive, and safe keep therein, all prisoners committed under the authority of the United States . . .; the United States to pay for the use and keeping of such gaols, at the rate of fifty cents per month for each prisoner that shall, under their authority, be committed thereto, during the time such prisoners shall be therein confined; . . ." 1 Stat. 96, Sept. 23, 1789. See also 1 Ann. of Cong. 86 (1834); Act of June 25, 1910, Ch. 395.

[3] See, e.g., Prigg v. Pennsylvania, 16 Peters 539 (1842); Ableman v. Booth, 21 Howard 506 (1859).

[4] 36 Stat. 825, 18 U. S. C. §2421 *et seq.* (1948).

[5] Act of December 17, 1914, Ch. 1, 38 Stat. 785 (1914).

[6] Motor Vehicle Theft Act, Act of Oct. 29, 1919, Ch. 89, 41 Stat. 324, 325; 18 U. S. C. §§2312-2313 (1948).

[7] Act of June 22, 1932, Ch. 271, 47 Stat. 326, 18 U. S. C. §1201 (1948).

[8] Act of May 18, 1934, Ch. 302, 48 Stat. 782. Act of Aug. 14, 1946, Ch. 735, 60 Stat. 789, 18 U. S. C. §1073 (1948).

[9] See, *e. g.* Sonzinsky v. United States, 300 U. S. 506 (1937) (upholding validity of the National Firearms Act of 1934); Hoke v. United States, 227 U. S. 308 (1913) (upholding validity of the Mann Act); United States v. Doremus, 249 U. S. 86 (1919) (upholding the Harrison Act); United States v. Kahriger, 345 U. S. 22 (1953) (upholding validity of the gambling tax).

[10] Useful materials include Clark, The Rise of a New Federalism (1938); Millspaugh, Crime Control by the National Government (1937); Cummings and McFarland, Federal Justice (1937).

[11] The substance of this section is derived from a paper, prepared by the writer, entitled "The Supreme Court and State Criminal Justice," 4 Wayne L. Rev. 191 (1958).

[12] 287 U. S. 45 (1932).

[13] 261 U. S. 86 (1923).

[14] An extensive literature discusses these and other issues. See, *e. g.*, Allen, The Wolf Case; Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1 (1950); Boskey and Pickering, Federal Restrictions on State Criminal Procedure, 13 U. of Chi. L. Rev. 266 (1946); Hall, Police and Law in a Democratic Society, 28 Ind. L. J. 133 (1953); Paulsen, The Fourteenth Amendment and the Third Degree, 6 Stan. L. Rev. 411 (1954); Scott, Federal Restrictions on Evidence in State Criminal Cases, 34 Minn. L. Rev. 489 (1950). See also Beisel, Control over Illegal Enforcement by the Law (1955); Fellman, The Defendant's Rights (1958).

[15] Allen, Griffin v. Illinois; Antecedents and Aftermath, 25 U. of Chi. L. Rev. 151, 154 (1957).

[16] 6 Wheat. (U. S.) 264 (1821).

[17] See U. S. Const. Art. I, §10 and Art. IV, §2.

[18] 100 U. S. 303 (1880).

[19] 100 U. S. 339 (1880).

[20] *E. g.*, Ex parte Medley, 134 U. S. 160 (1890); Thompson v. Utah, 170 U. S. 343 (1898). See also: Holden v. Minnesota, 137 U. S. 483 (1890); McNulty v. California, 149 U. S. 645 (1893); Thompson v. Missouri, 171 U. S. 380 (1898); Mc Donald v. Massachusetts, 180 U. S. 311 (1901); Mallet v. North Carolina, 181 U. S. 589 (1901); Rooney v. North Dakota, 196 U. S. 319 (1905); Ross v. Oregon, 227 U. S. 150 (1913).

[21] Ex parte Reggel, 114 U. S. 642 (1885); Roberts v. Reilley, 116 U. S. 80 (1885); Lascelles v. Georgia, 148 U. S. 537 (1893); Pearce v. Texas, 155 U. S. 311 (1894); Bryant v. U. S. 167 U. S. 104 (1897); Cosgrove v. Winney, 174 U. S. 64

(1899); Hyatt v. People ex rel. Corkran, 188 U. S. 691 (1903); Re Strauss, 197 U. S. 324 (1905); Pettibone v. Nichols, 203 U. S. 192 (1906); Appleyard v. Massachusetts, 203 U. S. 222 (1906); Marbles v. Creecy, 215 U. S. 63 (1909); Strassheim v. Daily, 221 U. S. 280 (1911). And see Ker v. Illinois, 119 U. S. 436 (1886); Mahon v. Justice, 127 U. S. 700 (1888); Cook v. Hart, 146 U. S. 183 (1892).

[22] *E. g.*, Ex parte Royall, 117 U. S. 254 (1886); Ex parte Frederich, 149 U. S. 70 (1893); Whitten v. Tomlinson, 160 U. S. 231 (1895); Re Eckhart, 166 U. S. 481 (1897); Re Boardman, 169 U. S. 39 (1898); Urquhart v. Brown, 205 U. S. 179 (1907); Matter of Spencer, 228 U. S. 652 (1913); Frank v. Mangum, 237 U. S. 309 (1915).

[23] Of course, a great many of these cases involved no substantial federal questions, and many of the cases that went to opinion would not have survived the sifting process involved in the exercise of certiorari jurisdiction. See, *e. g.*, Brooks v. Missouri, 124 U. S. 394 (1888); Baldwin v. Kansas, 129 U. S. 52 (1889); Caldwell v. Texas, 137 U. S. 692 (1891); Lambert v. Barrett, 157 U. S. 697 (1895). A few of the cases which the Court found to present no substantial questions, however, retain considerable interest. See Spies v. Illinois, 123 U. S. 131 (1887) (the Chicago "anarchist" case); Felts v. Murphy, 201 U. S. 123 (1906) (Petitioner alleged that, although he was almost totally deaf, the state took no measures to inform him of the testimony and evidence against him.); Slocum v. Brush, 140 U. S. 698, 35 L. Ed. 753 (1891) (Appellant alleged that the person appointed to represent him in the state trial that led to his conviction for first degree murder was not a member of the bar.).

[24] Chicago, Milwaukee & St. Paul R. Co. v. Minnesota, 134 U. S. 418 (1890); Lochner v. New York, 198 U. S. 45 (1905); Coppage v. Kansas, 236 U. S. 1 (1915).

[25] See, *e. g.* Hurtado v. California, 110 U. S. 516 (1884); Maxwell v. Dow, 176 U. S. 581 (1900); Twining v. New Jersey, 211 U. S. 78 (1908).

[26] International Harvester v. Kentucky, 234 U. S. 216 (1914); Collins v. Kentucky, 234 U. S. 634 (1914); American Seeding Machine Co. v. Kentucky, 236 U. S. 660 (1915).

[27] See note 13, *supra*.

[28] See note 12, *supra*.

[29] See, *e. g.*, Criminal Justice in Cleveland (1922); Missouri Association for Criminal Justice, Missouri Crime Survey (1926); Illinois Association for Criminal Justice, Illinois Crime Survey (1929).

[30] Moley, Our Criminal Courts (1930).

[31] Nat. Comm. on Law Enforcement, Report No. 11, Lawlessness in Law Enforcement (1931).

[32] Act of Feb. 13, 1925, Ch. 229, 43 Stat. 936 (1925).

[33] "But the various statutory changes substituting review by a writ of grace, certiorari, has released the Supreme Court from the difficult administrative problem, and has enabled it to take jurisdiction in cases like [Powell v. Alabama], without danger of overcongestion of its calendar." Note 23 J. Crim. L. & Crim. 841, 843 (1933).

[34] Thus, for most practical purposes the development of the modern law of free speech may be dated from Schenck v. United States, 249 U. S. 47 (1919). But see Patterson v. Colorado, 205 U. S. 454 (1907).

[35] *E. g.*, Waite, Police Regulation by Rules of Evidence, 42 Mich. L. Rev. 679 (1944); Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442 (1948).

[36] Consult Corwin, Liberty Against Government (1948).

[37] Miller, J. in the Slaughter-House Cases, 16 Wall. 36, 80 (1873): "The first of these paragraphs has been in the Constitution since the adoption of the 5th Amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present Amendment may place the restraining power over the states in the hands of the Federal government."

[38] See, *e. g.*, Stone v. Farmers' Loan and Trust Co., 116 U. S. 307 (1886); Chicago Railway Co. v. Minnesota, 134 U. S. 418 (1890).

[39] 110 U. S. 516, 531 (1884).

[40] Thus, in Lowe v. Kansas, 163 U. S. 81, 85 (1896): "Whether the mode of proceeding, prescribed by this statute, and followed in this case, was due process of law, depends upon the question whether it was in substantial accord with the law and usage in England before the Declaration of Independence, and in this country, since it became a nation, in similar cases."

[41] An extreme example is Owenby v. Morgan, 256 U. S. 94 (1921).

[42] 332 U. S. 46 (1947).

[43] A similar problem was resolved in the same fashion in Twining v. New Jersey, 211 U. S. 78 (1908).

[44] 7 Pet. 243 (1833).

[45] See 2 Crosskey, Politics and the Constitution (1953) 1056 *et seq.* Cf. Fairman, The Supreme Court and the Constitutional Limitations on State Governmental Authority, 21 U. of Chi. L. Rev. 40 (1953).

[46] 176 U. S. 581, 605 (1900).

[47] 211 U. S. 78, 114 (1908).

[48] The formula has been stated in numerous variations of language. Palko v. Connecticut, 302 U. S. 319, 325 (1937) (Rights "implicit in the concept of ordered liberty"); Brown v. Mississippi, 297 U. S. 278, 285 (1936); Synder v. Massachusetts, 291 U. S. 97, 105 (1934) ("principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental"); Herbert v. Louisiana, 272 U. S. 312, 316 (1926) ("principles of liberty and justice which lie at the base of all our civil and political institutions . . .").

[49] See Wolf v. Colorado, 338 U. S. 25, 40, 41, 47 (1949) (dissenting opinions); Rochin v. California, 342 U. S. 165, 174-179 (1952) (concurring opinion).

[50] See Wolf v. Colorado, 338 U. S. 25 (1949).

[51] 287 U. S. 45 (1932).

[52] Id. at 56.

[53] 6 & 7 Wm. IV, c. 114 (1836). See also 7 & 8 Wm. III, c. III (1695-6).

[54] When, six years later, the Court turned to the counsel provisions of the Sixth Amendment, applicable to federal prosecutions, it interpreted the language as requiring appointment of counsel in all felony cases. See Johnson v. Zerbst, 304 U. S. 458 (1938).

[55] 287 U. S. 45, 68-69 (1932). Emphasis supplied.

[56] Id. at 71.

[57] 308 U. S. 444 (1940).

[58] Id. at 446.

[59] 312 U. S. 329 (1941).

[60] 316 U. S. 455 (1942).

[61] Id. at 471.

[62] Id. at 473.

[63] 323 U. S. 471 (1945).

[64] 323 U. S. 485 (1945).

[65] 324 U. S. 760 (1945).

[66] 326 U. S. 271 (1945).

[67] 324 U. S. 786 (1945).

[68] Id. at 788.
[69] 329 U. S. 173 (1946).
[70] 332 U. S. 134 (1947).
[71] In White v. Ragen, 324 U. S. 760, 764 (1945) and House v. Mayo, 324 U. S. 42, 46 (1945) the reader is asked to "compare" Betts v. Brady with such cases as Williams v. Kaiser and Tomkins v. Missouri. In DeMeerleer v. Michigan, 329 U. S. 663 (1947) the reader is instructed to "see" the Betts case.
[72] 329 U. S. 663 (1947).
[73] 333 U. S. 640 (1948).
[74] It is sometimes asserted that the Court has never clearly established the "flat requirement" of counsel, even in the trial of capital cases. There, in fact, appears to be no square holding on the point. Nevertheless, the opinions of the Court contain many statements of this proposition. Thus in Bute v. Illinois, 333 U. S. 640, 674 (1948), it is explicitly stated that . . . "if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps." Throughout the opinion the non-capital character of the felony is emphasized. The statement of Mr. Justice Reed in the Uveges case, note 75 infra, appears to recognize the obligation of the state in any capital prosecution to appoint counsel for the indigent defendant, at least in the absence of waiver. The same assumption pervades the most recent opinions of the Court. See text accompanying note 91. Cf. Carter v. Illinois, 329 U. S. 173 (1946).
[75] In Uveges v. Pennsylvania, 335 U. S. 437, 440-441 (1948), Mr. Justice Reed, for the Court, explained the situation as follows: "Some members of the Court think that where serious offenses are charged, failure of a court to offer counsel in state criminal trials deprives an accused of rights under the Fourteenth Amendment. They are convinced that the services of counsel to protect the accused are guaranteed by the Constitution in every such instance . . . Only when the accused refuses counsel with an understanding of his rights can the court dispense with counsel. Others of us think that when a crime subject to capital punishment is not involved, each case depends on its own facts."
[76] 334 U. S. 728 (1948).
[77] 334 U. S. 736 (1948).
[78] 335 U. S. 437 (1948).
[79] Id. at 441.
[80] 337 U. S. 773 (1949).
[81] 342 U. S. 134 (1951).
[82] 348 U. S. 105 (1954).
[83] 335 U. S. 155 (1957).
[84] 339 U. S. 660 (1950).
[85] See 333 U. S. 640, 668 (1948).
[86] E.g., the opinion of Mr. Justice Frankfurter for the Court in Foster v. Illinois, 332 U. S. 134, 136-138 (1947).
[87] Id. at 139.
[88] Cf. concurring opinion of Mr. Justice Frankfurter in Griffin v. Illinois, 351 U. S. 12, 25-26 (1956).
[89] See, *e.g.*, Illinois Supreme Court Rule 26 (2), Smith-Hurd Ill. Stat. Ann. c. 110, §101.26.
[90] 348 U. S. 3 (1954).
[91] 357 U. S. 433 (1958).
[92] Id. at 441, n. 6.
[93] Id. at 441. (Italics in the original.)
[94] 357 U. S. 426 (1958).
[95] 357 U. S. 504 (1958).
[96] 354 U. S. 393 (1957).
[97] 352 U. S. 330 (1957).
[98] Consult: Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957); Diana, The Rights of Juvenile Delinquents: An Appraisal of Juvenile Court Procedures, 47 Jour. Crim. L., Crimin. and Pol. Sci. 561 (1957); Waite, How Far Can Court Procedures be Socialized Without Impairing Individual Rights? 12 Jour. Crim. L. and Crimin. 339 (1921); Allen, The Borderland of the Criminal Law; Problems of "Socializing" Criminal Justice, 32 Soc. Ser. Rev. 107 (1958).
[99] A substantial part of this section is derived from Allen, Due Process and State Criminal Procedures: Another Look, 48 Nw. U. L. Rev. 16, 18-22 (1953).
[100] See, *e.g.*, Warickshall's Case, 1 Leach Crown Cases 298 (3d ed. 1783).
[101] See, *e.g.*, Ziang Sung Wun v. United States, 266 U. S. 1 (1924).
[102] The classic argument for this position is presented in 3 Wigmore, Evidence §§822-826 (3d ed. 1940).
[103] 322 U. S. 596, 605 (1944).
[104] "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true." Rochin v. California, 342 U. S. 165, 173 (1952) *per* Frankfurter, J.
[105] 3 Wigmore, Evidence §§856-858 (3d. ed. 1940) and cases cited.
[106] See, especially, McCormick, The Scope of Privilege in the Law of Evidence, 16 Texas L. Rev. 447 (1938) and McCormick, Some Problems and Developments in the Admissibility of Confessions, 24 Texas L. Rev. 239 (1946).
[107] 297 U. S. 278 (1936).
[108] See summary of the brief in 80 L. Ed. 682, 683 (1936).
[109] 309 U. S. 227 (1940).
[110] 310 U. S. 530 (1940).
[111] 316 U. S. 547 (1942).
[112] 322 U. S. 143 (1944).
[113] 324 U. S. 401 (1945).
[114] It has been suggested – wrongly, it is believed – that this principle was overturned in Stein v. New York, 346 U. S. 156 (1953). Cf. dissenting opinion of Mr. Justice Clark in Payne v. Arkansas, 356 U. S. 560, 569 (1958).
[115] 338 U. S. 49 (1949).
[116] 338 U. S. 62 (1949).
[117] 338 U. S. 68 (1949).
[118] 338 U. S. 49, 54 (1949).
[119] Id. at 55.
[120] Ibid.
[121] 343 U. S. 181 (1952).
[122] 346 U. S. 156 (1953).
[123] For invaluable discussion of the case see Meltzer, Involuntary Confessions: The Allocation of Responsibility between Judge and Jury, 21 U. of Chi. L. Rev. 317 (1954).
[124] 347 U. S. 556 (1954).
[125] 352 U. S. 191 (1957).
[126] See text accompanying note 91 supra.
[127] 356 U. S. 560 (1958).
[128] 356 U. S. 390 (1958).
[129] 352 U. S. 191, 193 (1957).
[130] 332 U. S. 596 (1948).
[131] McNabb v. United States, 318 U. S. 332 (1943).
[132] 354 U. S. 449 (1957).
[133] 342 U. S. 55 (1951), and see Fikes v. Alabama, 352 U. S. 191 (1957); Crooker v. California, 357 U. S. 433 (1958).
[134] Ward v. Texas, 316 U. S. 547, 555 (1942).
[135] See the White, Ward, Watts, Turner, Harris, Fikes and Payne

cases, cited supra.

[136] 338 U. S. 49, 57 (1949). See also the remarks of the same justice dissenting in Stroble v. California, 343 U. S. 181, 203-204 (1952): "The practice of obtaining confessions prior to arraignment breeds the third degree and the inquisition. As long as it remains lawful for the police to hold persons incommunicado, coerced confessions will infect criminal trials in violation of the commands of due process of law." And see Mr. Justice Douglas' dissenting opinion in Crooker v. California, 357 U. S. 433, 441 (1958).

[137] But cf. the strongly critical views expressed in Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442 (1948).

[138] Malinski v. New York, 324 U. S. 401, 404 (1945).

[139] See, especially, the dissenting opinion of Mr. Justice Jackson in Ashcraft v. Tennessee, 322 U. S. 143, 156 (1944). See also dissenting opinion of Mr. Justice Harlan in Fikes v. Alabama, 352 U. S. 191, 199 (1957).

[140] See, e.g., People v. Wynekoop, 359 Ill. 124, 194 N. E. 276 (1934) and 3 Wigmore, Evidence §821 (3d ed. 1940).

[141] Ashcraft v. Tennessee, 327 U. S. 274 (1946).

[142] 3 Wigmore, Evidence §859 (3d Ed. 1940) and cases cited.

[143] The phrase is Mr. Justice Frankfurter's in Nardone v. United States, 308 U. S. 338, 341 (1939), involving the "derivative" use of information gained through illegal wiretapping. For consideration of a similar problem in connection with illegal searches and seizures, see Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920).

[144] 338 U. S. 25 (1949). The case is discussed in Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 Ill. L. Rev. 1 (1950); Reynard, Freedom from Unreasonable Search and Seizure—A Second Class Constitutional Right? 25 Ind. L. J. 259 (1950).

[145] Sisk v. Overlade, 220 F. 2d 68 (1955).

[146] 342 U. S. 117 (1951).

[147] 342 U. S. 165 (1952).

[148] 347 U. S. 128 (1954).

[149] 352 U. S. 432 (1957).

[150] This, of course, is not to say that there are not other important decisions which have rested wholly or in part on the equal protection clause. See, e.g., Griffin v. Illinois, 351 U. S. 12 (1956) (indigent defendant may not be barred from appellate review of conviction because he lacks means to supply a transcript); Eskridge v. Washington State Board, 357 U. S. 214 (1958). See also Cochrane v. Kansas, 316 U. S. 255 (1942) and Dowd v. Cook, 340 U. S. 206 (1951) (prison rules forbidding inmates to file petitions in court deny prisoners equal protection of the laws).

[151] 100 U. S. 303 (1880).

[152] 100 U. S. 339 (1880).

[153] Cases decided in the fifty years following 1880 include: Virginia v. Rives, 100 U. S. 313 (1880); Neal v. Delaware, 103 U. S. 370 (1881); Bush v. Kentucky, 107 U. S. 110 (1883); Williams v. Mississippi, 170 U. S. 213 (1898); Carter v. Texas, 177 U. S. 442 (1900); Tarrance v. Florida, 188 U. S. 519 (1903); Rogers v. Alabama, 192 U. S. 226 (1904); Martin v. Texas, 200 U. S. 316 (1906); Thomas v. Texas, 212 U. S. 278 (1909); Franklin v. South Carolina, 218 U. S. 161 (1910). And see: Andrews v. Swartz, 156 U. S. 272 (1895); Gibson v. Mississippi, 162 U. S. 565 (1896); Murray v. Louisiana, 163 U. S. 101 (1896).

[154] Cases decided in the modern period include: Norris v. Alabama, 294 U. S. 587 (1935); Patterson v. Alabama, 294 U. S. 600 (1935); Hale v. Kentucky, 303 U. S. 613 (1938); Pierre v. Louisiana, 306 U. S. 354 (1939); Smith v. Texas, 311 U. S. 128 (1940); Hill v. Texas, 316 U. S. 400 (1942); Akins v. Texas, 325 U. S. 398 (1945); Patton v. Mississippi, 332 U. S. 463 (1947); Moore v. New York, 333 U. S. 565 (1948); Cassell v. Texas, 339 U. S. 282 (1950); Shepherd v. Florida, 341 U. S. 50 (1951); Brown v. Allen, 344 U. S. 443 (1953); Williams v. Georgia, 349 U. S. 375 (1955); Reece v. Georgia, 350 U. S. 85 (1955); Michel v. Louisiana, 350 U. S. 91 (1955). Another case in this sequence was added near the end of the 1957 term, Eubanks v. Louisiana, 356 U. S. 584 (1958).

[155] 339 U. S. 282 (1950).

[156] 332 U. S. 261 (1947).

[157] 333 U. S. 565 (1948).

[158] 332 U. S. 261, 283-284 (1947).

[159] Id. at 287.

[160] 110 U. S. 516 (1884).

[161] 176 U. S. 581 (1900).

[162] Id. at 605.

[163] 319 U. S. 427 (1943).

[164] Moore v. Missouri, 159 U. S. 673 (1895); Hawker v. New York, 170 U. S. 189 (1898); Murphy v. Massachusetts, 177 U. S. 155 (1900); McDonald v. Massachusetts, 180 U. S. 311 (1901); Dryer v. Illinois, 187 U. S. 71 (1902); Shoener v. Pennsylvania, 207 U. S. 188 (1907); Keerl v. Montana, 213 U. S. 135 (1909); Brantley v. Georgia, 217 U. S. 284 (1910); Graham v. West Virginia, 224 U. S. 616 (1912).

[165] 302 U. S. 319 (1937).

[166] See Kepner v. United States, 195 U. S. 100 (1904).

[167] 302 U. S. 319, 325 (1937).

[168] Id. at 328.

[169] 344 U. S. 424 (1953).

[170] 355 U. S. 281 (1958).

[171] 260 U. S. 377 (1922).

[172] 356 U. S. 969 (1958). No 39, 1957 Term.

[173] No. 534, 1957 Term.

[174] 356 U. S. 464 (1958).

[175] 356 U. S. 571 (1958).

[176] The opinion contains the following sentence: "Mr. Justice Frankfurter and Mr. Justice Harlan, although believing that the matters set forth in the aforementioned newspaper articles might, if established, require a ruling that fundamental unfairness existed here, concur in the affirmance of the judgment because this material, not being part of the record, and not having been considered by the state courts, may not be considered here." Id. at 573.

[177] 261 U. S. 86 (1923).

[178] Id. at 91. Cf. Frank v. Mangum, 237 U. S. 309 (1915).

[179] 273 U. S. 510 (1927).

[180] 277 U. S. 61 (1928).

[181] 349 U. S. 133 (1955).

[182] 276 U. S. 607 (1928).

[183] 333 U. S. 257 (1948).

[184] 294 U. S. 103 (1935).

[185] See Hepler v. Florida, 315 U. S. 411 (1941).

[186] 355 U. S. 28 (1957).

[187] Bridges v. California, 314 U. S. 252 (1941); Pennekamp v. Florida, 328 U. S. 331 (1946); Craig v. Harney, 331 U. S. 367 (1947).

[188] 341 U. S. 50 (1951).

[189] Id. at 52.

[190] 343 U. S. 181 (1952).

[191] Id. at 201.

[192] 343 U. S. 946 (1952).

[193] 351 U. S. 454 (1956).

[194] Cf. statement in Report of the Special Committee on Co-

operation Between the Press, Radio, and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings, 62 A.B.A. Rep. 851, 859-860 (1937); "A statement . . . asking the public to suspend judgment upon the accused until the charges . . . can be fully investigated, would seem to be the *limit* beyond which counsel ought not to go."

[195] See text at note 175, *supra*.

[196] A full appraisal would require a more extensive inquiry than has yet been undertaken into the impact of the Court's decisions on local law-enforcement practices. But even if attention is confined to doctrinal matters, completeness would require close consideration of the law relating to the assertion of federal rights in state post-conviction procedures and through federal habeas corpus proceedings. See *e.g.*, Goodman, Use and Abuse of the Writ of Habeas Corpus, 7 F. R. D. 313 (1948); Parker, Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171 (1949). And see Report of the Special Comm. on Habeas Corpus to the Con. of State Chief Justices (Council of State Gov., 1953). Cf. Pollack, Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L. J. 50 (1956).

[197] See text accompanying note 42, *supra*.

[198] See text accompanying note 60, *supra*.

[199] See text accompanying note 165, *supra*.

[200] See text accompanying note 160, *supra*.

[201] See note 132, *supra*.

[202] See text accompanying note 144, *supra*.

[203] See note 42, *supra*.

[204] Wolf v. Colorado 338 U. S. 25 (1949). See text accompanying note 144, *supra*.

[205] See text accompanying note 85, *supra*.

[206] Allen, Due Process and State Criminal Procedures: Another Look, 48 Nw. L. Rev. 16, 34-35 (1953).

[207] Illinois Supreme Court Rule 26 (2), Smith-Hurd Ill. Ann. Stat. c. 110, §101.26.

[208] Id. at §101.65.

[209] Ill. Rev. Stat. c. 38, §§826-832 (1957).

[210] White v. Ragen, 324 U. S. 760 n. 1 (1945); United States ex rel. Bongiorno v. Ragen, 54 Supp. 973 (N. D. Ill. 1944).

[211] Illinois Supreme Court Rule 65-1, Smith-Hurd Ann. Stat. c. 110, §101.65-1.

[212] But see Minnesota ex rel. Pearson v. Probate Court, 309 U. S. 270 (1940).

Supercession and Subversion: Limitations on State Power To Deal With Issues of Subversion and Loyalty

By ROGER C. CRAMTON
Assistant Professor of Law
University of Chicago Law School

In the decade or more since the end of World War II issues of subversion and loyalty have been of great public concern. Although this is not the first time in American history when a preoccupation with the loyalty of citizens has necessitated an accommodation of the competing claims of national security and individual freedom, the recent history has raised most acutely the problem of federal-state relations in the area of subversion and loyalty. The resolution of these issues by the Supreme Court is the subject matter of this article.

A first aspect of the problem, the distribution between the states and the federal government of power to deal with matters of subversion and loyalty, has broad implications for our federal system of government. Consequently, the *Nelson* case,[1] which sharply limited the sphere of state action with respect to subversion, will be analyzed in detail as a case study in the operation and rationale of the Supreme Court's doctrine of federal supercession of state legislation.

The second aspect of the problem, the extent to which the exercise of power in this area by either the states or the federal government is consistent with constitutional guarantees of individual liberty, is part of the larger problem of satisfying the needs of national security while preserving individual freedom. With international tension likely to continue for the foreseeable future, a viable accommodation of freedom and security is a necessity. Because the primary concern here is with federalism, limitations on congressional power will be discussed only where necessary to illuminate the limitations which have been imposed on state power to deal with issues of subversion and loyalty.

If the states had been content to leave issues of subversion and loyalty to the federal government, these problems of federalism would not have plagued us to the same degree. Unfortunately, the states have not been content to do so.[2] Many state legislatures have embarked on ambitious programs of legislative investigation in order to uncover and expose disloyal or subversive persons and organizations. The use and abuse by investigating committees of their extensive powers, however, is only the prologue to the steady stream of legislation dealing with every phase of "subversion" which has poured from state capitols. Existing laws prohibiting treason, insurrection, sabotage, sedition and the like have been refurbished and expanded. Communists and subversives have been excluded from public office and denied the right to vote. Loyalty oaths have been widely required not only of elected officials and public employees but of other groups as well, particularly lawyers and teachers. Comprehensive registration statutes have required organizations or persons defined as "subversive" to register with state authorities. Disabilities are imposed on those who register, while a failure to register subjects the alleged "subversive" to criminal penalties. In some states the Communist Party has been made an unlawful organization; nearly everywhere substantial disabilities have been imposed on Communists. Among the various privileges and benefits which have been denied to "subversives" are jury service, public housing, tax exemptions and welfare benefits. And, finally, many municipalities have thought it necessary to duplicate the federal and state legislation with local ordinances covering the same ground.

It is difficult to escape the belief that much of this legislation has been both unnecessary and unwise. The danger of internal subversion has been magnified at times out of all proportion to the actual evil. Existing legislation, with minor exceptions, was capable of handling the problem, especially in its overt manifestations. Given the extensive federal legislation and enforcement, the need for action on the part of the states would have been satisfied by full cooperation with federal authorities.

If the state activity concerning loyalty and subversion is judged by its results rather than by its supposed necessity, the same conclusion is reached. A mere handful of admitted Communists have been prosecuted in state courts for sedition or similar crimes.[3] The Communist Party has been deprived of the somewhat dubious opportunity of capturing the vote of the common man. The registration schemes have been entirely inoperative: throughout the country only one individual is reported to have registered. Despite the lack of registrants, no prosecutions for failure to register have been brought. Only the loyalty oath requirements have proved to be of much consequence. Under their aegis, a substantial number of persons, including some Communists, have been removed from public employment (including such sensitive positions as subway conducting!) and from professions such

as teaching and law. This has been accomplished only at great cost in terms of the human losses resulting from dismissals and harassments and in terms of a climate of public opinion unfavorable to free expression of political views.[4] On balance, it seems likely that the excessive concern of the state governments with the loyalty of citizens has caused more damage to the free society, and produced far less in the way of results, than would have a quieter, more moderate approach.

But these expressions of opinion do not answer the constitutional issues. For better or for worse, the states have acted and the issue is their constitutional power to have done so. This is a matter on which personal views as to the wisdom of legislation have only a restricted relevance. The distribution of power in our federal system between the federal government and the states is the abiding verity; power cannot be redistributed merely because of a distaste for particular exercises of that power. Present-day limitations on state power to deal with issues of subversion and loyalty will be examined in this light.[5]

I. THE *NELSON* CASE—A CASE STUDY IN FEDERAL PREEMPTION

In *Pennsylvania* v. *Nelson*[6] the Supreme Court, drawing on the metaphorical tests for "occupation of the field" developed in commerce clause cases, held that federal legislation regulating communist activity had superseded the Pennsylvania Sedition Act. The decision, which invalidated similar statutes in forty-two states[7] and raised serious doubt as to the validity of other state measures in this field, has been much criticized, and there has been strong pressure for congressional reversal.[8] The merit of these proposals is beyond the scope of this paper, which will consider only (1) the propriety of the Supreme Court's application of preemption doctrine in the *Nelson* case,[9] and (2) the effect of the decision on state power with respect to subversive activities.

Nelson, an admitted member of the Communist Party, was convicted in a Pennsylvania state court for knowingly advocating the overthrow, by force or violence, of the governments of the United States and of Pennsylvania.[10] The Pennsylvania Supreme Court, finding that the case involved only sedition against the United States, reversed the conviction, holding that the Smith Act of 1940 had superseded the enforceability of the Pennsylvania Sedition Act.[11] The United States Supreme Court affirmed.[12]

The Court, in an opinion by Chief Justice Warren, held that the federal statutes dealing with national security, particularly the Smith Act of 1940,[13] the Internal Security Act of 1950[14] and the Communist Control Act of 1954,[15] "occupied the field" because each of several "tests of supercession" had been met: (1) "The scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it."[16] (2) "[T]he federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject."[17] And (3) the "danger of conflict with the administration of the federal program" is "serious."

The scheme of federal regulation was thought "pervasive" because the Smith Act, the Internal Security Act of 1950 and the Communist Control Act of 1954 in the "aggregrate" made "inescapable" a conclusion that "Congress has intended to occupy the field of sedition."[19] The dominance of the federal interest was evidenced by the "all-embracing program for resistance to the various forms of totalitarian aggression" devised by Congress,[20] including the proscription of sedition against local and state governments as well as against the nation. The congressional findings that communist sedition was "part of a world conspiracy" indicated that sedition against the United States was a national, rather than a local, offense. The "serious" danger of conflict wth federal administration was based on statements of federal officials requesting local law enforcement officers to turn over to the F.B.I. all information relating to subversive activities; on the lack of uniformity and safeguards of the various state sedition laws; and on the peculiar feature of the Pennsylvania statute permitting actions to be brought on private information alone.

Finally, the Court indicated that the possibility of double punishment was a factor in its decision: "Without compelling indication to the contrary, we will not assume that Congress intended to permit the possibility of double punishment."[21]

Several novel aspects of the case merit attention. Nelson is apparently the first case in which the Supreme Court has held that a federal criminal statute, not involving a regulatory scheme under the commerce clause, supersedes, in the absence of conflicting provisions, the enforceability of a concurrent state criminal statute.[22] The application of tests developed in commerce clause cases to sedition legislation based on the federal war powers itself marks a significant extension of preemption doctrine. And finally, the Court's frequent use in recent years of preemption doctrine to effect broad displacements of state authority reopens the more important question of the soundness of preemption doctrine as it has been developed by the Court.

Ambiguity of the Tests Applied by the Court

The *Nelson* case builds on and exemplifies the de-

ficiencies of the Supreme Court's law of preemption.[23] The Court drew three "tests of supercession" from the available armory and undertook, with their guidance, to discover the intent of Congress. Although these tests —the dominance of the federal interest, the pervasiveness of the federal scheme, and the possible conflict in administration—represent relevant considerations, their content here as elsewhere is undefined, and their application fails to provide a confident answer to the question to which they were supposedly directed—the intent of Congress.

1. *Dominance of the Federal Interest.* The Court's assertion that communist sedition is a matter of paramount interest to the federal government must be readily accepted. The Constitution empowers Congress to "provide for the common Defense and general Welfare of the United States,"[24] provides war powers of sweeping nature,[25] and charges the federal government with the duty of "guarantee[ing] to every State in this Union a Republician Form of Government."[26] Whatever may have been the localized impact of street-corner anarchist speeches, the modern problem of subversion by a tightly-organized conspiracy is a national problem calling for a national solution. But to concede this is not to solve the preemption problem.

The Court assumed that whenever Congress legislates in a field in which the federal interest is dominant, it intends to preclude enforcement of state laws on the same subject. If congressional intent is really to be controlling, the assumption seems fallacious. Why should it be assumed that state legislation embodying the same purpose and prohibiting the same activity is thereby invalidated? Is it not as reasonable to assume that Congress contemplated the cooperation of the states against the common enemy?[27] Either assumption—that of preclusion or that of cooperation—appears equally reasonable (or equally unreasonable!) in the absence of any other evidence of congressional intent. And what little evidence there is supports an inference of cooperation rather than preclusion: Congress was aware of the widespread existence of state legislation prohibiting sedition; its own statute was largely copied from one of the older state statutes; and Congress did nothing expressly to preclude the continued operation of these state statutes.

Moreover, it is not enough to say that the federal interest is dominant. The interest of the states in self-preservation and in preservation of the Union must also be considered. State legislation based on these interests, proscribing treason, sedition, espionage and similar offenses, is old. Overlapping federal legislation on these matters has existed at various times and contentions that the federal legislation preempted the field have been rejected whenever made.[28]

Gilbert v. *Minnesota*[29] was the leading case. Gilbert had been prosecuted and convicted in a state court for interfering with military enlistment during World War I, conduct which was also proscribed by the Federal Espionage Act.[30] The Court, in affirming the conviction, emphasized the cooperative nature of the federal system and the interest of the states in assisting the federal government in preserving the whole. The Court's opinion went on to say that the state statute was justified as a local police power measure designed to prevent breaches of the peace. In the *Nelson* case, *Gilbert* was treated as resting solely on the narrower police power ground.[31] Limiting *Gilbert* to its narrowest holding, clearly not the intended one,[32] reduces the case to insignificance.

Instead, the Court in *Nelson* relied on *Hines* v. *Davidowitz*,[33] in which the Federal Alien Registration Act of 1940[34] was held to supersede a Pennsylvania alien registration statute. The common feature of the two cases is that both involve matters of vital federal interest. But there the resemblance ceases. The state regulation involved in the *Davidowitz* case required aliens to carry an identification card at all times, a burdensome feature which Congress had rejected. Moreover, the Court felt that the existence of dual regulation would have repercussions on United States foreign policy, a matter within the exclusive power of the federal government. Finally, overlapping regulation was involved in the *Davidowitz* case, rather than concurrent criminal statutes as in the *Nelson* case, and as will be seen, this factor is of some significance.

2. *Pervasiveness of the Federal Scheme.* It is true that the Smith Act, the Internal Security Act of 1950, and the Communist Control Act of 1954 add up to a tidy bit of legislation. But does it follow from the fact that Congress enacted three major communist control measures in the space of fifteen years that Congress "intended to occupy the field of sedition?"

It should be noted first that only one of these statutes deals with sedition. The Smith Act,[35] the only federal statute dealing directly with sedition, is a criminal statute pure and simple, prohibiting certain defined conduct. It proscribes among other things the advocacy of the overthrow of federal or state governments by force or violence. The Internal Security Act of 1950 and the Communist Control Act of 1954 have more of a regulatory character. The former requires the registration of "Communist-action organizations" and "Communist-front organizations";[36] the latter declares "that the Communist Party . . . is in fact an instrumentality of a conspiracy to overthrow the Government of the United States"[37] and that it is a "Communist-action" organization within the meaning of the Internal Security Act of 1950, and provides that

"knowing" members of the Communist Party are "subject to all the provisions and penalties" of that act.[38]

Moreover, it is not true that the broad treatment by Congress of any subject within its power automatically bars supplemental action by the states dealing with the same subject matter. *California* v. *Zook*[39] serves as an extreme illustration in an area complicated by the negative implications of the commerce clause. A regulation of the Interstate Commerce Commission pursuant to the Motor Carrier Act of 1955 prohibited the sale of "share expense" automobile passenger transportation in interstate commerce where the transporting carrier had no permit from the ICC. Despite the broad regulatory character of the federal legislation, the Court affirmed a conviction under a California statute prohibiting conduct identical to that prescribed by the federal act.

An example drawn from another area of federal action may clarify the point. A complicated set of federal statutes, filling 220 pages of the United States Code, deals with banks and banking.[40] These include comprehensive legislation covering the organization and regulation of national banks, the Federal Reserve System, and the Federal Deposit Insurance Corporation, to name only a few. A related provision of the criminal code proscribes bank robbery and related crimes involving banks organized, operating, or insured under the laws of the United States.[41] Does the existence of this comprehensive federal legislation mean that states are without power to punish robberies from such banks which occur within their jurisdiction? The answer has always been thought to be otherwise.[42]

The existence of concurrent state and federal criminal statutes dealing with sedition can with equal logic support either the inference that Congress intended to supplement state law or that it intended to replace state law. To label other federal legislation dealing with national security as a "pervasive scheme of regulation" does not advance this logic, but states a conclusion which must have been reached on other grounds.

3. *Possible Conflict of Administration.* A clear-cut showing that state sedition prosecutions had interfered with the administration of the Smith Act might have redeemed the deficiencies of "dominance" and "pervasiveness." Unfortunately, despite the considerable period of concurrent legislation, the Court was unable to adduce any evidence of actual conflict in administration. It relied instead on the possible danger of administrative conflict in the future which might result from dual legislation and lack of uniformity in the provisions of the state statutes.

Statements made during 1939 and 1940 by President Roosevelt and J. Edgar Hoover requesting the states to turn over any information with respect to subversive activities to the federal government were quoted as supporting a danger of conflict. As Mr. Justice Reed pointed out in the dissent, these statements contained "no suggestion from any official source that state officials should be less alert to ferret out or punish subversives."[43] The views of the Department of Justice, appearing at the invitation of the Court to state the position of the United States, to the effect that the state legislation had not impeded federal enforcement would appear to be entitled to at least as much weight.

Inapplicability of Commerce Clause Tests

Enough has been said to indicate that the Court treated the *Nelson* case as though it were a case such as *Hines* v. *Davidowitz*,[44] in which a state exacted additional requirements on a matter regulated by Congress. The tests applied in *Nelson* were largely drawn from commerce clause cases involving a deviation of state law from the federal pattern, rather than a mere coincidence of state and federal law.[45] The case would more properly have been treated as one of coincidence of state and federal criminal statutes.

The common feature of the Smith Act of 1940, the Internal Security Act of 1950 and the Communist Control Act of 1954 is that each is concerned with national security. But, as pointed out above, the Smith Act is the only federal criminal statute dealing directly with sedition. Although the Internal Security Act contained new criminal provisions proscribing conspiracy to establish a totalitarian dictatorship and communication or receipt of classified information,[46] its major concern is the elaborate registration scheme for communist organizations.[47] The criminal penalties for failure to register are incidental to the regulatory scheme.[48] The Communist Control Act expanded the registration scheme to include "Communist-infiltrated" organizations and extended the requirements of the Internal Security Act to knowing members of the Communist Party.[49]

Although these statutes are interrelated, only the registration and related provisions of the Internal Security Act and the Communist Control Act would seem to constitute a comprehensive regulatory scheme of the type that has been thought to require a preemptive intent. The question in the *Nelson* case was not whether state statutes requiring registration of communist organizations and members had been superseded, but only whether state sedition prosecutions were precluded.[50] The case before the Court involved only the coincidence of state and federal criminal legislation, not differing state and federal regulatory schemes.

The Pennsylvania Sedition Act and the Smith Act,

by very similar language, attempt to reach the same objectives—the punishment of advocacy of the violent overthrow of established government. They are criminal statutes proscribing specified conduct and creating substantive crimes independently of any administrative or statutory regulation. In this respect they are like statutes punishing murder, robbery, or kidnapping, which are crimes against both state and nation whenever elements giving rise to both federal and state jurisdiction are present.[51] Although the federal government may have a more vital interest in punishing sedition, particularly when a worldwide conspiracy is involved, the states also have a legitimate interest not only in self-preservation but also in the preservation of the Union.[52] Once it is assumed, as the Court did, that the states have concurrent power with the federal government to punish sedition against the federal government, it is difficult to see why cooperative federalism is a one-way street. Why is it the federal government through its criminal statutes may aid the states in the preservation of public order—a primary responsibility of the states in our tradition—but the states may not endeavor to assist the federal government in the achievement of primarily federal objectives such as the preservation of the Union? In the absence of any compelling evidence of congressional intent or of a conflict of statutory provisions, federal unity would be subserved by allowing cooperative state action. Thus a preemptive intent should not have been inferred in the *Nelson* case absent a showing of conflict.

Importance of Other Factors

The Court's opinion itself suggests that the real problem of the case—whether state sedition prosecutions should be permitted once Congress had actively entered the field—was decided on more pragmatic grounds than are comprehended in the hazy aphorisms of preemption. The opinion manifests a strong distaste for the state statutes in this field: many "are vague and are almost wholly without . . . safeguards."[53] The Pennsylvania statute in particular is severely criticized: one of its provisions is "strangely reminiscent of the Sedition Act of 1798"[54] and the fact that a prosecution may be initiated by a private individual "presents a peculiar danger of interference with the federal program" and provides an opportunity "'for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition.'"[55] Finally, and most importantly, the Court gives great weight to the possibility of double punishment.[56]

The magnitude of the threat to civil liberty presented by overlapping state and federal criminal statutes should not be minimized. The possibility that an individual may be subjected to successive state and federal prosecution for what would otherwise be regarded as a single crime raises serious questions of policy if not of constitutional law. Exposing an individual to a second trial when the first has resulted in an acquittal by a jury contravenes an honored tradition of Anglo-American society. Likewise, punishing an individual twice for the same act violates "the principles of the common law, and the genius of our free government."[57] Concurrent criminal statutes may be the cause of other dilemmas. The privilege against self-incrimination may be deprived of substance if a witness in a proceeding in one jurisdiction is compelled to answer questions which incriminate him under the laws of another jurisdiction. The right to be secure against unreasonable searches and seizures may be abased if evidence illegally obtained by state officers is utilized in a federal trial.

Despite the impairment of civil liberty, the Supreme Court has held that a second prosecution or punishment by a different government for the same act does not violate the Due Process Clause[58] or the constitutional provision against double jeopardy.[59] Similarly, it has been held that the constitutional privileges protecting against self-incrimination and illegal searches and seizures do not prevent the use in a federal proceeding of incriminating evidence obtained by testimonial compulsion from a witness in a state proceeding[60] or obtained illegally from him by state officials.[61]

The possibilities of double punishment and attendant difficulties created by overlapping state and federal criminal laws are considerations which a legislature should bear in mind in deciding whether dual legislation is desirable. But are they factors which should influence the decision of preemption cases? The history and development of federal criminal legislation suggests that ordinarily such factors should not influence the decision of preemption questions.

The early denial of a federal common-law criminal jurisdiction[62] placed the primary responsibility for the maintenance of public order on the states. Prior to the Civil War the criminal legislation enacted by Congress was confined entirely to matters of distinctive federal concern: offenses not subject to state jurisdiction (District of Columbia, territories, high seas)[63] and offenses directly threatening the existence, integrity or property of the federal government and its institutions (treason, contempt of court, resistance or obstruction to federal process, bribery of federal officers, theft of federal property, defrauding of the revenue and the like).[64] The protection of private individuals from harms committed by other private individuals, and the use of criminal sanctions to deter and punish such harms, became a traditional responsibility of the states.

When the federal government entered the same field in a major way in the twentieth century,[65] it did so primarily to aid the states in enforcing their criminal laws. In some instances (mail fraud, lottery by mail), the use of federal instrumentalities was involved, but the connection would appear to be a jurisdictional handle rather than a real connection with any distinctive interest of the federal government. In some instances (e.g., mail fraud), the lack of any local incentive to prosecute for harms which have their primary impact elsewhere was involved. But the major factors have been either a congressional desire to enlist the powerful forces of the nation to preserve public morality (lottery, white slave, narcotics) or a desire to aid state enforcement in situations where it might be frustrated by the inability of state law enforcement officers of limited territorial authority to cope with the interstate movement of criminals or stolen property (motor vehicle theft, kidnapping, stolen property).[66]

The circumstances of enactment, if not express provision, made it clear in most of these instances that the Congress did not intend to displace state criminal action in these fields. Even when matters of distinctive federal concern, such as the protection of federal property, were involved, the natural inference was that Congress intended to supplement state laws and not to displace them.[67] The state interest in preventing breaches of the peace is involved to the same extent no matter whose property is taken. State law enforcement officers have provided protection to federal property from the earliest days of the government. It is in the interest of the federal government to have them active in the protection of federal property, for otherwise a more extensive national law enforcement staff would be required. Possible conflicts in the administration of these dual criminal laws and the general undesirability of possible double prosecution or double punishment cannot outweigh the manifest intention of Congress to *supplement* existing state criminal legislation. Thus the historical development of federal criminal legislation and its interstitial character have been thought to preclude a finding that Congress intended to "occupy the field."[68]

Other factors have contributed to this conclusion. In many instances Congress has by specific language dealt with the problem, either saving state jurisdiction by express provision[69] or preventing dual prosecution.[70] And the inference of preemptive intent that might otherwise be drawn from the fear of dual prosecutions is considerably diluted by the fact that, in practice, such prosecutions are extremely rare.[71]

The *Nelson* case is not the first case in which the Court has been influenced in its decision of preemption questions by fear that the existence of overlapping state and federal criminal legislation would result in deprivation of civil liberties.[72] Nor can it be said that under present Supreme Court preemption doctrine, which requires the Court to make a search for congressional intent that is almost invariably illusory, this is an irrelevant consideration. But it is questionable whether a court should undertake such a task. Attempting to ascertain the intention of Congress on the basis of an assessment of possible deprivations of civil liberties, which have not occurred and may not occur, involves the weighing of legislative considerations and the dangers of advisory opinions. Might it not be better to adjudicate any constitutional questions as they arise?

The Supreme Court appears about to do this with respect to double prosecution or punishment by a different government for the same act. There have been intimations in recent years that the Court was unhappy with the doctrine of the *Lanza* case[73] and might be willing to overrule it or distinguish it as involving a special Eighteenth Amendment problem. The Court has recently heard argument in two cases reopening the issue which *Lanza* had appeared to settle: whether a second prosecution or punishment by a different government for the same act violates the due process clause or the constitutional provision against double jeopardy. In *Bartkus* v. *Illinois*,[74] the petitioner was convicted of bank robbery in a state court after an acquittal in a federal court of robbery of the same bank. The elements of the state and federal offenses, and the interests protected, were the same, aside from the jurisdictional allegation in the federal case that the bank's funds were federally insured. In *Abbate* v. *United States*,[75] the other pending case, a federal conviction for conspiracy to destroy communication facilities operated or controlled by the United States followed a state conviction for conspiracy to injure private property. In this case, unlike *Bartkus*, the interests sought to be protected by the federal and state laws do not appear to be the same, and it is arguable that the elements of the two offenses are different.[76] In any event, the Court now has before it the constitutional problems which, one surmises, had an important influence on the *Nelson* decision. It does not seem unlikely that the *Lanza* rule will be overturned and that the states will be forbidden to prosecute a person acquitted of the same act after a federal trial. If this occurs, the justification for deciding in favor of preemption in the *Nelson* case disappears to the extent that the decision was based on a desire to prevent dual prosecution and punishment.

The Saving Clause

In a footnote to its opinion[77] the Court disposed of an argument, accepted by the dissent, that the saving

clause of the criminal code demonstrated a congressional intent not to supersede state criminal statutes. This saving clause presently appears as the second sentence of Section 3231 of the criminal code, which in its entirety reads as follows:

> The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.
>
> Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.[78]

The Court said that the saving clause was intended "merely" to limit the effect of the jurisdictional grant of the first sentence of Section 3231, and was not intended "to resolve particular supercession questions."[79] This construction of the saving clause does violence to the plain meaning of the words used and is contrary to its long-established interpretation.

The first sentence of Section 3231, by vesting exclusive jurisdiction of "all offenses against the laws of the United States," operates to preclude the states from enforcing *federal* criminal laws.[80] Standing alone, it might also have been susceptible of the interpretation that state power to punish for any act constituting an offense against the laws of the United States had been superseded. The Court, in the *Nelson* case, is apparently saying that the only function of the saving clause is to negative this possible inference. The language, however, is much broader: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." Taken literally, the saving clause means that the states retain their original powers to define and punish criminal conduct occurring within their respective jurisdictions, *notwithstanding the fact that the same conduct is punishable as an offense against the United States.*

Of course, a general provision of the criminal code, such as the saving clause, cannot prevent Congress from subsequently enacting legislation which is intended to supersede state legislation. The specific enactment would control rather than the more general. But a general provision may create a policy of nonpreemption which is overborne only by an actual conflict of provisions or a clear expression of congressional intent to the contrary.

The history of the two sentences of Section 3231 is instructive. The first sentence of Section 3231, vesting exclusive jurisdiction of federal crimes in the federal courts, may be traced back to Section 11 of the Judiciary Act of 1789,[81] which declared that the Circuit Courts of the United States shall have "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides or the law of the United States shall otherwise direct." Most of the early federal criminal statutes, by language almost identical to the present saving clause, did "otherwise direct." Federal statutes of 1806 and 1807 prohibiting counterfeiting and uttering of "current coin" of the United States were the first to do so:

> . . . nothing in this act contained shall be construed to deprive the courts of the individual states of jurisdiction under the laws of the several states, over offenses made punishable by this act.[82]

A similar provision was contained in the Federal Crimes Act of 1825,[83] the first comprehensive federal criminal legislation. With slight changes in phraseology, the saving clause was incorporated in the Revised Statutes of 1878 and made applicable to the entire criminal code.[84] Since 1909 it has been applicable to what is now Title 18 of the United States Code —the criminal code.[85]

Until the 1948 revision of the criminal code, the first sentence of present Section 3231, vesting exclusive jurisdiction of federal crimes in the federal courts, and the second sentence, saving to the states jurisdiction "under the laws thereof," were separate sections.[86] The reviser, as part of the revision of Title 18, combined them to form present Section 3231. The change, of course, was not intended to make any change in substance.[87]

The Supreme Court definitively construed the saving clause in *Sexton* v. *California*.[88] Sexton was convicted in a California state court of extorting money from another by threatening to accuse him of violating the internal revenue laws of the United States. The identical conduct was prohibited by a federal criminal provision. The Court, emphasizing the fact that the federal statute was within the scope of the saving clause, unanimously held that the conduct was "an offence both against the State and the United States, punishable in each jurisdiction under its laws."[89] The saving clause was said to "take the case out of the" exclusive jurisdiction of the criminal code, and its function described as follows:

> "The [saving clause] was not intended to merely permit a state court to punish a different offence involved in the one act. It was intended to leave with the state court, unimpaired, the same jurisdiction over the act that it would have had if Congress had not passed an act on the subject."[90]

The Smith Act is one of the criminal provisions of the criminal code and is subject to the general provisions of Section 3231.[91] The Supreme Court should have held that the saving clause operates to preserve, after the enactment of the Smith Act, the preexisting power of the states to legislate with respect to sedi-

tion. Mr. Justice Reed would appear to be correct in stating that "this one point seems in of itself decisive."[92]

Effect of the Decision

The *Nelson* case holds that the states cannot punish for sedition directed against the United States government, but declares that they remain free to punish for offenses involving a local breach of the peace. Except at these extremes, the scope and effect of the decision are unclear. Only the passage of time will clarify intermediate situations, such as the effect of the decision on state criminal prosecutions for other overlapping offenses, on state communist control measures, on state loyalty oath programs, and on state legislative investigations. Foolish as it may be, some guesses with respect to each of these will be hazarded.

1. *State Criminal Prosecutions.* Two state court decisions subsequent to the *Nelson* case have reached the conclusion that a state can no longer punish sedition directed against the state when the evidence also establishes an attempt to overthrow the federal government.[93] The conclusion reached would appear to be correct. Although the seditious conduct in the *Nelson* case was said to be directed solely against the federal government, the reasoning of the Court is equally applicable to any case in which communist sedition is involved. The Smith Act prohibits attempts to overthrow state or local governments as well as the federal government.[94] The nature of the communist movement, when considered in connection with the congressional declaration that the Communist Party is engaged in a worldwide conspiracy to overthrow established government,[95] makes it unlikely that any case involving communist sedition would not present an attack against federal as well as against state authority. State activity in this area would appear to require evidence of an actual or threatened local breach of the peace. If, for example, a seditious speech resulted in a serious public disturbance, the state could impose punishment. The *Nelson* case does not "limit the right of the State to protect itself at any time against sabotage or attemped violence of all kinds."[96] And the decisive issue should be whether there is evidence of a threat to a distinctive local interest, such as maintenance of public order, and not the label affixed to the indictment.

Outside of the sedition area, the *Nelson* case suggests a distinction that may prove to have a considerable effect on state power to punish for overlapping federal-state offenses: State power to punish conduct which also constitutes a federal offense exists if the conduct threatens or produces a local breach of the peace. A similar distinction was suggested under somewhat false colors in the famous case of *Fox* v. *Ohio*.[97] Fox had been convicted in a state court for uttering false coin, and the Court, in sustaining his conviction, stated that counterfeiting and uttering of spurious coin were distinct and independent crimes. Counterfeiting affected a distinctive interest of the federal government—its monopoly over the coinage of money—, whereas utterance of spurious money affected a distinctive local interest—the protection of the local citizenry from fraud. This distinction might have made some sense if the utterance of base coin had not also been prohibited by a federal statute. The Court's deliberate ignoring of this crucial fact, relied on by appellant and stressed by a dissenting judge, merely raised doubts as to the constitutionality of the federal statute prohibiting utterance. Three years later, by a unanimous decision in *Ex parte Marigold*,[98] the federal statute was upheld and the doubt settled. Ever since it has been established doctrine that both the states and the federal government can punish the utterance as well as counterfeiting of spurious money.[99]

The likely effect of the *Nelson* decision is not to prevent all state prosecutions for an offense also punishable under federal law, but only to require that some aspect of local police power be involved. Both state and federal governments can continue to punish such overlapping offenses as bank robbery,[100] assault on a federal officer,[101] theft from a post office[102] and the like,[103] since in each case the criminal conduct inevitably involves a local breach of the peace.

It is probable, however, that state power to punish other overlapping offenses, such as interference with federal recruitment, desecration of the United States flag, impersonation of a federal officer and the like, is no longer permissible absent a showing that a local breach of the peace was involved. In each of the above instances the state law is auxiliary to federal law enforcement. The states are seeking to aid the federal government in maintaining respect for federal institutions. Although there is no logical reason why the police power of a state should not encompass the furthering of national purposes and unity, these matters are of distinctive federal interest, and the existence of a federal penalty may be thought to require a finding of preemption.

People v. *Von Rosen*,[104] a recent Illinois case, is the first case after *Nelson* to apply these principles. The defendants, who had published a picture of a young woman innocent of any clothing other than a large hat, sunglasses, and a small and appropriately placed piece of cloth resembling the United States flag, were convicted in a state court for public desecration of the United States flag, conduct also prohibited by a federal statute. The Illinois Supreme Court, in replying to the argument that the federal

statute had "occupied the field," concluded: "While it might be inferred that Congress has left no room for the States to punish desecration *qua desecration,* it cannot be inferred that Congress intended to prevent the States from prohibiting that which incites or tends to incite a breach of peace."[105] The court therefore interpreted the state statute as limited to situations where the conduct was likely to produce a breach of peace within the state. Since there was no evidence in the record tending to show likelihood of a breach of the peace, the court reversed the conviction—" . . . the Illinois act cannot be constitutionally applied to these defendants."[106]

2. *State Communist Control Measures.* A number of states have comprehensive communist control measures resembling the federal Subversive Activities Control Act of 1950 and Communist Control Act of 1954.[107] These statutes provide for registration of communist and subversive organizations, set out penalties for sabotage, and impose various disabilities upon registrants, such as exclusion from the ballot and public office. Other states require registration but do not impose disabilities upon registrants.[108] Many states have statutes resembling the federal Foreign Agents Registration Act of 1938[109] and the Voorhis Act of 1940,[110] requiring registration of foreign agents and propagandists, or statutes requiring the registration of aliens during wartime or other periods of emergency.[111]

It is probable that most of the provisions of these statutes have been superseded by federal legislation. The statutes dealing with aliens and foreign agents would appear to have been invalidated by *Hines* v. *Davidowitz.*[112] In any event, there has been no attempt to enforce the provisions of these state statutes.

The registration statutes duplicate and enlarge the federal registration scheme. Nearly all of them differ from the federal scheme in one or more respects. Some are accompanied by provisions outlawing the Communist Party. Because of the probable conflict of provisions, there is a much clearer case for preemption with reference to these statutes than there is with respect to the sedition statutes invalidated by the *Nelson* case. Moreover, the breadth and thoroughness of the federal scheme plus the square precedent provided by the *Davidowitz* case, make it much easier to infer a preemptive intent on the part of Congress.[113] It is not surprising that the Michigan Supreme Court, in *Albertson* v. *Millard,*[114] held that Michigan's comprehensive communist control law had been superseded by the similar provisions of federal communist control measures.

3. *Civil Disqualifications.* Existing state statutes impose a variety of civil disqualifications on subversives: exclusion from the elective process; loyalty oaths as a qualification for public office, public employment, teaching positions, admission to the bar, and so on; and denial of various privileges and benefits (voting, jury service, tax and welfare benefits, etc.).[115] It seems probable that most of these provisions are unaffected by the *Nelson* case and remain enforceable. The only authority thus far, a decision of the Florida Supreme Court upholding the loyalty oath required of Florida's state employees,[116] supports this conclusion.

Qualifications imposed by the states on office holding and public employment present the easiest case. The states have a vital interest in controlling eligibility for public office and public employment. No federal statutes deal directly with these matters and federal power to do so is subject to question.[117]

Serious problems are raised, however, by various state laws denying the use of election facilities, and other rights and privileges, to the Communist Party and other subversive organizations. These restrictions are in accord with federal policy—the Communist Control Act of 1954 declares that these organizations are not entitled to any rights, privileges, or immunities heretofore granted by the United States or any political subdivision thereof.[118] The state statutes may effect a greater or lesser deprivation, or there may be an exact coincidence. In either case it is arguable, though perhaps improbable, that the state provisions have been superseded by the blanket federal termination of "rights, privileges, and immunities," at least in elections for federal offices.

4. *State Legislative Investigations. Sweezy* v. *New Hampshire,*[119] considered hereafter, bears more directly on the power of state legislatures to investigate subversive activities. However, the *Nelson* case would appear to have a restrictive effect of indeterminate proportions in this area. Legislative inquiries which affect individual liberties are permitted only when a public need to obtain information on which to base legislation concerning a recognized public evil justifies the intrusion. If the states lack effective power to enforce legislation with respect to a particular matter, such as sedition, it would seem that the power to conduct legislative inquiries leading toward such legislation would be reduced in scope. Of course, so long as states are free to impose a wide range of civil disqualifications on alleged subversives, a wide-ranging legislative inquiry into subversive activities within the state could be based on the need to ascertain the factual basis for such legislation.[120]

The Preemption Doctrine—An Evaluation

The analysis of the *Nelson* case in this article suggests that the Court erred (1) in failing to examine

critically the applicability of the "tests of supercession" drawn from commerce clause cases, and (2) in failing to reckon in serious fashion with the saving clause of 18 U.S.C. §3231. The discussion thus far has proceeded entirely on the assumption that the states have concurrent power with the federal government to prescribe criminal penalties for sedition directed against the United States. This assumption has been made only because the Supreme Court decided the case on that basis. It is possible, however, that the assumption is unwarranted and that the case reaches the right result, although for the wrong reasons.

The federal war powers are broad and inclusive. May it also be added that they are exclusive? Surely some of them, such as the declaration of war, the maintenance of armed forces and the conduct of war, are responsibilities of the federal government alone.[121] And although the states retain the power of self-preservation to suppress insurrection and repel invasion, the duty of preserving the state governments rests upon the federal government. Do the states have any role to play when a seditious attack upon the federal government is made? It would seem that just as the states may not punish treason against the United States,[122] so also the power to punish sedition directed against the United States is beyond their province.[123] This, at least, is an arguable position, which finds some support in history and which results in a tenable distinction between federal and state spheres of action: State action involving a matter within the exclusive competence of the federal government, such as national defense and foreign relations, is justified only if conduct constituting a local breach of the peace has occurred. This view justifies the result, if not the rationale, in *Nelson* and in *Hines* v. *Davidowitz*.

The *Nelson* case, however, has not been given this lengthy treatment merely to demonstrate that its result is right or wrong. The analysis of the case has significant implications for preemption doctrine generally. These more general conclusions will now be explored.

Cases presenting preemption problems may be divided into three general classes, each of which has been accorded somewhat different treatment because of the differing policy considerations that are applicable. First, in a few cases federal and state statutes have been found in *conflict* in the sense that compliance with one necessarily constitutes violation of the other. *Southern Ry. Co.* v. *Reid*[124] is one of the infrequent cases of this kind. A North Carolina statute which subjected rail carriers to penalties for failure to transport freight to interstate points as soon as received was held to conflict with a federal statute forbidding such transportation until rates had been fixed and published. While it may be difficult to determine whether a conflict actually exists, once one is found the supremacy clause of Article VI controls the result. The state statute must give way.

A second class of cases, involving situations where a state pattern of regulation *deviates* from the federal pattern without directly conflicting with it, is more difficult of solution. The state regulation may differ in that it imposes an additional requirement on the same matter,[125] or in that it closes a gap in the federal scheme by regulating a closely related matter.[126] In either case a similar problem arises: Did Congress intend that its regulation should stand alone? In the usual case congressional intent is unclear, and conflicting inferences may be drawn from the fact that the regulatory patterns differ from one another. On the one hand it is possible that congressional failure to embody the deviating provisions of the state regulation in the federal regulation indicates congressional rejection of those provisions. This negative inference may be nourished by judicial speculation concerning possible "inconsistency" of the state regulation with the policy, purpose or administration of the federal statute. On the other hand, the very difference of the federal and state statutory schemes gives rise to the inference that the state statute serves a state interest independent from the federal interest safeguarded by the federal enactment. In a federal system the interests of both governments should be given recognition if it is possible to do so. This approach results in the validation of dual regulation.

Although various predictive factors exist, such as the historic pattern of state or federal regulation of particular matters, the Court has been extremely inconsistent in dealing with cases of this second type. The hollow repetition of catchwords such as "pervasiveness," "dominance," and the like, has merely obscured the Court's *ad hoc* fluctuation from the negative inference that deviation is an inconsistency to the inference that it expresses an independent state interest. In truth, both factors are almost invariably present. Any difference makes a difference (even if it be only the narrow one that the regulated party has two slightly different regulatory schemes to reckon with rather than a uniform scheme); and the state statute, to the extent that it differs from the federal, always expresses a peculiar concern of the state.

The third class of cases involves situations where federal and state statutes *coincide* by requiring or forbidding exactly or substantially the same thing. Cases of this type, like deviation cases, are frequent, but unlike deviation cases a large number of them involve criminal sanctions. Federal and state penalties dealing with share-expense automobile transporta-

tion,[127] transportation of diseased cattle,[128] and robbery of national banks[129] illustrate the variety of cases of this kind. Whatever the subject matter, however, the significant characteristic is that the same purpose underlies the respective action of the state and the federal government. This characteristic makes coincidence cases easier, and at the same time more difficult, of solution than deviation cases. Because the state legislation serves no independent purpose of its own it appears to lack justification, and there is a tendency to infer a preemptive intent.[130] On the other hand, given the realities of cooperative federalism in regulation and law enforcement, there is a natural inference that each jurisdiction may simultaneously protect its own interest and reinforce the interest of its governmental partner.[131]

These different views may be based on different conceptual theories concerning the nature of our federal system. If the state and federal governments are viewed as jealous sovereignties contending for power, with the Court in the position of an arbiter, the burden of overlapping regulation and the resulting possibilities of friction are likely to be magnified. The result is an inclination to infer a preemptive intent. Particularly is this so if the states have entered a field which is thought to be one of "predominant" federal interest. On the other hand, if one views the federal system as a cooperative whole, the fact that Congress, by enforcing the same regulation or proscribing the same conduct, has thought it wise to aid the states, or the states to aid Congress, is unlikely to induce the inference that Congress intended to displace the state legislation. It is only fitting that as partners in the same enterprise they should seek to assist one another toward their common objectives. Overlapping criminal statutes have long been viewed in this fashion.[132]

It is obvious from even a moment's reflection that both of these conceptual patterns contains elements of truth. A degree of competition and strife between the governments of a federal system is inevitable. Yet the entity could not long survive unless it also brought forth a high degree of cooperation. The inconsistent resolution of coincidence questions suggests that the court has not adopted either one of these generalized views but proceeds in a more particularistic fashion. Insofar as congressional intent is unclear (the thesis here is that that is the normal case) and precedent does not control the result (as it does with much overlapping criminal legislation), decision seems to turn on a case-by-case determination of whether the duplication of legislation is wise. If the burden placed on persons subject to the dual regulation or exposed to dual punishment is not outweighed by the positive value the Court sees in legislative duplication, such as more effective enforcement, the state statute is likely to be struck down. It should go without saying that subjective considerations with respect to the desirability of particular kinds of economic regulation or criminal penalties cannot help but participate in this balancing process.

The most significant problem raised by preemption cases is the role which should be played by the Supreme Court. The thesis of this article is that in the *Nelson* case, as in most preemption cases, congressional intent is not only unclear but unfathomable, and that the "tests of supercession" which the Court purports to apply do not provide an answer to the question to which they are supposedly directed—the intent of Congress. The conclusion which is drawn is that judicial notions concerning the desirability in particular cases of overlapping regulatory schemes or overlapping criminal sanctions are more significant in determining the results. Should the Supreme Court exercise this type of policy judgment?

It is worth noting that the alternatives of the Court are extremely limited—if there is no objective method of determining congressional intent and if the Court eschews the broader policy judgment of the desirability of the overlapping legislation, the only alternative is the automatic application of a conclusive presumption for or against a preemptive intent on the part of Congress. The Court apparently has felt that the exercise of a broader judgment is the wiser course. No doubt it has been influenced by the reluctance and inability of Congress to provide legislative solutions. The close balance of contending groups in the Congress may operate to foreclose any immediate legislation or to force a compromise which leaves the displacement of state law deliberately vague. Congressional performance in the field of labor relations may be of this character.[133] Perhaps it is not unfair for the Court to interpret congressional silence as an invitation for the Court to provide answers as problems arise. In other areas, lack of interest in the subject matter or lack of awareness of the complexity of the problems may explain the failure of Congress to lay down adequate guides. Even in these situations the Court may be justified in making the policy judgments which Congress has failed to make. And, this writer feels, as a policy matter the Court for the most part has exercised its judgment in preemption cases in a wise fashion.

Despite the appeal of the Court's record, it is believed that the exercise of such functions by the Court is inappropriate. A democratic society should not commit such important matters to the relatively unencumbered judgment of non-elected officers. Moreover, the application of a presumption would have the virtue of forcing legislative concern with prob-

lems which no legislature should be permitted to avoid. If a presumption were to be applied, it seems clear that it should be a presumption that Congress did not intend to supersede overlapping state legislation. In a federal system the interests of both the states and the federal government should be given recognition until they come into collision with one another. The states cannot remain as independent centers of governmental power if the expression of state policies is foreclosed merely by the enactment of federal legislation dealing with the same or a closely related subject-matter. A presumption in favor of preemption is destructive of state power. The opposing presumption permits the state to continue as viable units while leaving Congress free to protect the federal interest when it is threatened by state legislation.

Conclusion

The question of federal supercession of state legislation only arises when Congress, exercising a power not within the exclusive competence of the federal government, has dealt in a constitutional fashion with the same conduct or legal relations which is the concern of the otherwise valid state legislation brought into question. Under traditional doctrine, the question is phrased in terms of whether, under the supremacy clause of Article VI, existing federal legislation has "occupied the field" to the exclusion of concurrent state legislation. The answer is said to turn on the intent of Congress. Since in any case likely to reach a court Congress has remained silent with respect to the displacement of state law, the courts are left to solve the problem with few if any guides. Ultimately, the Supreme Court must supply or presume an intent from whatever available materials it deems proper.

The purposes, scope and content of concurrent state and federal legislation are of such vast variety, and situations of concurrence so large in number, that a simple solution to preemption problems should not be expected. No abstract formula can resolve complicated problems of federalism. Nevertheless, the confusion of the cases, even bearing in mind that no two preemption cases present the same problem, is striking. Various "tests" of supercession are stated in the cases, singly or in combination,[134] and the choice of a particular test or tests may be more decisive than its application. On some occasions only one test is viewed as controlling and others are ignored;[135] in other cases several are examined.[136] Nor is the content of any test much clearer. What is "conflict" in one case is characterized as "coincidence" in another; a "field" that is narrow here is broad there; and so on. Today as well as thirty-five years ago, it seems true that "The Court has drawn its lines where it has drawn them because it has thought it wise to draw them there."[137] It is no wonder that lawyers and judges who think that the law is discoverable and that continuity and certainty are indispensable have criticized the Court's handling of preemption problems.

If the "tests of supercession" which are inconsistently applied by the Court are themselves lacking in definition or priority, what is the touchstone of decision? It is hard to escape the feeling that the use or non-use of particular tests, as well as their content, is influenced more by judicial reaction to the desirability of the state legislation brought into question than by the metaphorical sign-language of "occupation of the field." And it would seem that this is largely unavoidable. The Court, in order to determine an unexpressed congressional intent, has undertaken the task of making the independent judgment of social values that Congress has failed to make. In making this determination, the Court's evaluation of the desirability of overlapping regulatory schemes or overlapping criminal sanctions cannot but be a substantial factor.

Much difficulty might have been avoided if the Court long ago had adopted actual repugnancy as an exclusive test of supercession. This test is relatively simple of application and comparatively free from subjectivity. Nevertheless, it reflects important postulates of federalism: the maintenance of local control over matters in which there is a local interest and the undesirability of centralization of power in the national government. Each government could protect its own interest, while the Court would confine its activity to the adjudication of alleged conflicts as they arose and the determination of constitutional issues created by the existence of dual sovereignty. Congress, of course, would be free to preclude state authority from a particular field if it thought it desirable.

The major objection to the conflict test is that it might fail to invalidate state regulation which, while not clashing head on, impairs the operation of the federal scheme, thus imposing a burden on Congress to make specific preclusions of state authority. The objection does not seem valid. The purpose and function of a statute is as much a part of the legislation as its specific terms, and any serious impairment of the federal regulatory scheme should be classed as an actual conflict. But the impairment should be actual rather than presumed or anticipated.

In evaluating the performance of the Court, the failure of Congress to provide satisfactory guidance should not be overlooked. Increased congressional attention to the working details of federalism is greatly to be desired. Heightened congressional awareness

of the implications of its legislation on the federal system; and greater care in legislative drafting to avoid or resolve such matters, would produce important gains.

II. LIMITATIONS ON STATE LEGISLATIVE INVESTIGATIONS—THE *SWEEZY* CASE

The power of state legislatures to compel testimony during the conduct of legislative investigations is unquestioned, but the constitutional limitations on this power have been relatively unexplored. In *Sweezy* v. *New Hampshire*,[138] the Supreme Court for the first time considered the right of witnesses to remain silent before state legislative committees. Although the decision suggests that free expression of ideas will outweigh a state's need for information, at least when subversive activities are involved, the case provides little guidance as to the controlling factors in balancing the interest of the state against the constitutional rights of the witness. Since the *Sweezy* case grows out of the more developed law dealing with limitations on congressional investigating power and builds on the foundation laid in the companion case of *Watkins* v. *United States*,[139] a brief survey of the federal development seems necessary before turning to the special problems in the state area.

Limitations on Congressional Power

Various constitutional provisions have been relied upon as imposing affirmative constitutional limitations on the power of Congress to compel testimony in congressional investigations. The fifth amendment privilege against self-incrimination has proved to be the surest means of frustrating congressional questioners, but at a cost which the witness often finds too great. Initially there was some doubt whether the privilege was applicable to legislative investigations as distinguished from judicial proceedings. Lower federal courts took the initiative in recognizing the applicability of the privilege to legislative investigations,[140] and this view is now firmly established.[141] The marked tendency in recent years to relax the showing which must be made by a witness claiming the privilege[142] has made the fifth amendment the most popular refuge of reluctant witnesses. But the use of the privilege may be disadvantageous even though a claim of privilege is almost certain to be upheld whenever the questions relate to alleged communist activities. In the first place, adverse publicity is almost inevitable. Secondly, if security tests are prevalent in the field of public or private employment in which the witness is engaged, the use of the privilege may result in discharge and loss of employment opportunities. It is for this reason that one of the crucial issues in recent years has been the extent to which adverse inferences might be drawn from the use of the privilege against self-incrimination.[143]

The disadvantages of relying on the privilege against self-incrimination have led to an exploration of other constitutional provisions as limitations on congressional investigations. The fourth amendment prohibition of unreasonable searches and seizures has been suggested as a limit on the breadth of legislative demands to produce documents,[144] but this seems doubtful since a physical invasion of the witness's person or premises is not involved.[145] The emphasis in congressional investigations of the last few decades on political activity and beliefs has led to numerous attempts to justify refusals to testify under the first amendment guarantee of freedom of speech.[146] Although first amendment rights have been recognized in several cases, in each case the legislative need for information has been held to outweigh the individual's interest.[147] Thus reliance on the first amendment has proved unsuccessful when congressional investigations have been involved. The impact of various inquiries on first amendment rights, however, has been a significant factor in the development of statutory, procedural and due process limitations on congressional investigations.

Three principal limitations have been developed. First, the investigation must have a valid legislative purpose in seeking information concerning a subject with which Congress may legislate.[148] Second, the investigating committee must have been specifically authorized by Congress to conduct the investigation in question.[149] And finally, the questions asked must be "pertinent to the question under inquiry."[150] These limitations, applied rather strictly because of the involvement of constitutional rights, have their source both in the contempt of Congress statute[151] and in the Constitution.[152]

In *Watkins* v. *United States*,[153] the Supreme Court, fusing first amendment arguments and existing procedural limitations, evolved a new and somewhat confusing procedural limitation on congressional investigative power. Watkins, a labor organizer, was summoned to appear before a sub-committee of the House Committee on Un-American Activities after two witnesses had testified that he had been a member of the Communist Party in 1944. Watkins denied that he had been a Communist and answered freely all questions relating to his political activities and associations. He declined, however, to answer questions relating to the political activities of past associates whom he did not believe were presently members of the Communist Party.[154] He did not invoke the privilege against self-incrimination, but contended that the committee had no power to ask such questions and that they were not relevant to any valid

legislative purpose. For his refusal to answer, Watkins was indicted and convicted for statutory contempt of Congress. The Court of Appeals for the District of Columbia Circuit, sitting *en banc*, affirmed the conviction.[155]

The Supreme Court reversed Watkins' conviction.[156] The majority opinion by the Chief Justice, a long and discursive essay on legislative investigations and constitutional rights, is lacking in clarity. But as Mr. Justice Frankfurter emphasized in his concurring opinion, the narrow holding of the case is only that the vagueness of the authorizing resolution and the undefined scope of the subcommittee inquiry failed to satisfy the due process requirements of definiteness.[157]

The House of Representatives had authorized the Un-American Activities Committee and its subcommittees to investigate all aspects "of un-American propaganda . . . [which] attacks the principle of the form of government as guaranteed by our Constitution . . . "[158] This resolution was thought to be so vague and broad that it did not inform Watkins what questions it authorized the subcommittee to ask. Nor did the subcommittee chairman, at the opening of the hearing, explain the scope and nature of the inquiry with sufficient particularity to enable Watkins to determine what questions would be relevant to the matter under inquiry.[159] The statute under which Watkins was convicted condemns only a refusal to answer questions which are "pertinent" to the inquiry, thus making pertinency an element of the offense.[160] Since Watkins was put in the position of being unable to ascertain the conduct required of him by law, due process standards of definiteness in criminal prosecutions were violated by his conviction.[161]

This holding marks some advance over prior doctrine, but is not a startling or unexpected development. The surprising features of the *Watkins* case are the suggestions in the opinoin of the Chief Justice that congressional investigations will be subjected in the future to delegation of power and first amendment limitations.

The emphasis on delegation of power comes in a portion of the opinion which stresses the separation of responsibility for exercise of investigative power from the actual exercise of that power.[162] The concern is with the relationship between the legislative body and the investigative body, and the requirement is that the legislature set forth with some clarity the authority of the investigatory body to conduct an investigation serving a valid legislative purpose. The vice of unconfined discretion in investigation is twofold: it is impossible for the witness to know whether or not the questions are pertinent to a valid inquiry, and, in addition, it is impossible for a court to know whether the parent body really wants the information being gathered by its investigators. The former is merely a restatement of the due process vagueness objection; the latter is apparently based on a concern that judicial review will be frustrated if the legislature does not circumscribe the authority of its investigators in terms which a court can assess.

One emphatic statement in the Chief Justice's opinion deserves repeating: " . . . there is no congressional power to expose for the sake of exposure."[163] The basis for this asserted limitation on the scope of legislative power presumably is that exposure is a form of punishment and punishment for past acts is a non-legislative function. Separation of powers concepts were formerly applied to legislative investigations. In *Kilbourn* v. *Thompson*[164] these concepts were utilized to supply a holding that Congress, in conducting an investigation into the operation of a real-estate pool in which the United States had a creditor's interest, usurped a judicial function and thus exceeded its own power. Subsequent cases cast doubt on this rationale,[165] but *Watkins* appears to have given it a rebirth. If so, the validity of the so-called "ventilating" investigation, in which Congress seeks to educate and inform the public in order to arouse popular support for particular legislation, is questionable. The Court, however, is careful to say: "The public is, of course, entitled to be informed concerning the workings of its government."[166] This and other statements leave the impression that "exposure" may have a wider scope when it is government officials, rather than private citizens, who are being grilled. This would appear to be a sound distinction.

The impact of legislative investigations on first amendment rights is sketched in equally broad fashion. The first amendment is applicable to legislative investigations because they are "part of lawmaking."[167] The interest protected is the individual's right to participate fully in the political process without answering to the state for that activity, as well as the indirect inhibition on political discussion which may result from a fear that expression of unorthodox views may lead to public obloquy. To compel a witness "to testify against his will, about his beliefs, expressions, or associations is a measure of government interference"[168] with first amendment freedoms which is not to be allowed in the absence of a clear showing that the public necessity for the information outweighs the inevitable impact on individual freedom. The Court, in the last analysis, must strike this balance; but in order to do so it must be able to measure the legislative need for the information. In order to weigh this need against the competing demands of individual expression, a "clear determination by the House or the Senate that a particular inquiry is

justified by a specific legislative need" must be provided.[169] The devitalization of judicial review once again appears to be the vice which demands clarity of legislative authorizations.

This jumble of constitutional and procedural limitations—the pertinency of the questions to the inquiry, the validity of the delegation to the committee, the constitutional validity of the legislative purpose, and the impact of the investigation on first amendment guarantees—necessarily entails considerable confusion. But it is doubtful that the confusion is entirely unintentional. A substantial majority of the Court has joined in an opinion which combines exhortation with warning. Without deciding any questions of power, it has cautioned Congress that the unrestricted intrusion of legislative investigations into private affairs will not, if continued, go unchecked. Meanwhile, new procedural limitations will operate to protect witnesses and enhance judicial review.

Limitations on State Legislative Investigations

Many of these principles are also relevant to the power of state legislatures to compel testimony in the course of legislative investigations. The scope of state investigatory power is a question of state law and varies from state to state depending upon the respective constitutional provisions and their judicial interpretation. In general, the investigatory power of the state legislatures, like that of Congress,[170] may be employed whenever appropriate to an exercise of recognized legislative powers.[171] Similarly, the federal Constitution imposes significant limitations on the exercise of investigative powers by state legislatures. Freedom of speech is a fundamental right protected against state abridgment through the due process clause of the fourteenth amendment.[172] The fourth and fifth amendments, however, are not carried over into the fourteenth amendment with the same thoroughness,[173] and thus are less important limitations.[174] The other major limitation is, of course, the due process clause of the fourteenth amendment.

In *Sweezy* v. *New Hampshire*,[175] the Court's dicta in *Watkins* are the foundation for a holding which merges first amendment and due process notions. In 1951 New Hampshire enacted a Subversive Activities Act [176] which imposed various disabilities on "subversive persons" and "subversive organizations." In 1953 a resolution of the legislature[177] constituted the attorney general a one-man legislative committee to investigate violations of the 1951 act and to recommend additional legislation. Sweezy, a non-Communist Marxist, was summoned to testify at the investigation conducted by the attorney general pursuant to this authorization. Sweezy testified freely about many matters but refused to answer two types of questions: (1) inquiries concerning the activities of the Progressive Party in the state during the 1948 campaign; and (2) inquiries concerning a lecture Sweezy had delivered during 1954 to a class at the University of New Hampshire.[178] For these failures to answer, Sweezy was adjudged in contempt by a state court. The New Hampshire Supreme Court, recognizing that the legislative investigation impaired Sweezy's first amendment rights, affirmed the contempt commitment on the ground that the state's interest in uncovering subversive activities within the state justified the impairment.[179]

The Supreme Court reversed, but no opinion was able to obtain a clear majority of the Court.[180] The Chief Justice, joined by Justices Black, Douglas, and Brennan, began by reaffirming the position adopted in the *Watkins* case that legislative investigations can encroach on first amendment rights. He then turned his fire on the New Hampshire Subversive Activities Act of 1951, to which the scope of the attorney general's authority had been tied by the authorizing resolution. The definition of "subversive persons" and "subversive organizations" in this act were said to be so vague and limitless that they extended to "conduct which is only remotely related to actual subversion and which is done free of any conscious intent to be a part of such activity."[181] The opinion then went on to discuss gratuitously and at some length the importance of academic freedom and political expression, emphasizing that a strong showing of justification would be necessary to permit any infringement in these areas.[182] Finally, the Chief Justice concluded, it was unnecessary in this case to balance the interest of the state against the rights of the individual—the resolution authorizing the investigation was so broad and unlimited that a valid state interest had not been expressed.

> "The respective roles of the legislature and the investigator thus revealed are of considerable significance to the issue before us. It is eminently clear that the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what witness will be summoned and what questions will be asked. *In this circumstance, it cannot be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which petitioner was interrogated.*"[183]

Four members of the Court, in concurring and dissenting opinions, took vigorous issue with the Chief Justice for suggesting that the conviction was invalid

because of the legislature's failure to provide adequate standards for the attorney general. They argued that the appointment and delegation of powers within a state government are matters of state law beyond the reach of the fourteenth amendment.[184] Since the New Hampshire court had determined that the attorney general had acted within the scope of the authority granted him by the legislature, the Court was required to balance the legislative need for the information against the impairment of first amendment rights which the investigation entailed. Mr. Justice Frankfurter, joined by Mr. Justice Harlan, concluded that the individual must prevail in this case because there was no basis for a belief that Sweezy or the Progressive Party threatened the safety of the state;[185] whereas Mr. Justice Clark, joined by Mr. Justice Burton, arrived at the opposite conclusion that New Hampshire's interest in self-preservation justified the intrusion into Sweezy's personal affairs.[186]

The most puzzling aspect of the *Sweezy* case is the reliance by the Chief Justice on delegation of power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the state has not demonstrated that it wanted the information seems so unreal as to be incredible. The state had delegated power to the attorney general to determine the scope of inquiry within the general subject of subversive activities. Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations,[187] a holding that a state legislature cannot delegate such power. It seems unlikely that the view of the Chief Justice, which has yet to commend itself to a majority of the Court, will receive long-run acceptance.

The generative power of the *Sweezy-Watkins* cases is yet to be determined. The *Watkins* case involves a more conventional holding and is therefore easier to justify. Thus far its major impact has been to encourage lower federal courts to interpret strictly congressional authorizing resolutions.[188] It is likely that Congress will be required to delegate investigative power with greater care; that committee chairmen will be required to clarify the pertinence of particular questions to the matter under inquiry; and that the free-wheeling character of many congressional investigations will be reduced but not eliminated.[189] On the other hand, it seems unlikely that the Court will impose severe restrictions on the power of congressional investigation itself.

The impact of the *Sweezy* case on state investigations is likely to be more marked. The Court apparently feels that subversion is a federal problem which should be dealt with by the federal government. Although it has been reluctant to impose a constitutional limitation on state power to investigate subversive activity, the reduced operation of state law in this field may make it difficult for a state to justify an investigation which substantially infringes first amendment rights.[190] Justices Frankfurter and Harlan have already indicated that a severe burden rests on the states: it must demonstrate an existing threat to the safety of the state. It is not likely that the Chief Justice, and Justices Black, Douglas and Brennan will require a lesser showing of justification. They have already announced in language of unmistakable breadth that "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields [academic freedom and political expression]."[191] But it is unnecessary to hazard guesses on such unpredictable matters. *Uphaus* v. *Wyman*,[192] now pending in the Supreme Court, squarely presents on similar facts the first amendment question left open in the *Sweezy* case. The scope of the *Sweezy* decision is likely to be much clearer in a very short time.

III. LIMITATIONS ON STATE POWER TO IMPOSE CIVIL DISQUALIFICATIONS

The extent of state power to impose civil disqualifications (loss of voting rights, denial of employment opportunities, loss of privileges and benefits, etc.) on persons and organizations considered subversive is not entirely clear and the law is still in the course of development. It is impossible in brief compass to canvass the entire subject.[193] However, the Supreme Court decisions in three important areas will be discussed: disqualification from public employment, disqualification from private employment, and the implications of a claimed right to silence.

Disqualification from Public Employment

It is unnecessary to pause over the semantic battle as to whether public employment is a "privilege" or a "right," for nothing should turn on such a barren classification. More intricate distinctions determine constitutional rights. It is clear, on the one hand, that the Constitution does not guarantee public office to anyone. Any governmental body can impose appropriate requirements to secure public employees who are qualified to discharge the manifold tasks of government.[194] On the other hand, the due process clause of the fourteenth amendment prohibits state and local governments from arbitrarily excluding persons from public employment on grounds which have no rational relation to suitability for such employment.[195] Similarly, the equal protection clause forbids a discriminatory classification, unrelated to fitness, which excludes a group of persons from public em-

ployment.[196] These principles serve as a foundation for dealing with the issues raised by statutes requiring a non-communist oath of public employees.

Garner v. *Board of Public Works*[197] is one of the leading cases. A 1941 amendment to the Los Angeles charter disqualified from municipal employment all persons declining to take an oath that they did not advocate the overthrow of the government by unlawful means or belong to organizations with such objectives. This charter amendment was implemented in 1948 by an ordinance requiring all city employees (1) to execute an affidavit "stating whether or not he is or ever was a member of the Communist Party . . .,"[198] and (2) to take an oath that presently or within the five preceding years they had not advocated the overthrow of the government by unlawful means or belonged to organizations with such objectives. Two municipal employees took the oath but refused to execute the affidavit; thirteen others refused to do either. After being discharged for these refusals, they brought an action in a state court for reinstatement and unpaid salaries. The state court denied relief,[199] and the Supreme Court affirmed.[200]

The Court treated the affidavit and the oath as raising distinct issues. The issue raised by the affidavit was simply whether a city might require its employees to disclose membership in the Communist Party. Seven members of the Court thought the answer clear.[201] Public employees could be required to disclose any matter relevant to a determination of present fitness and suitability for public service. In the context of the 1950's, membership in the Communist Party was relevant "to effective and dependable goverment, and to the confidence of the electorate in its government."[202] Government need not place its trust in persons dedicated to overthrow the government by force and violence. The Court emphasized, however, that since the dismissals of the two employees who refused to execute the affidavit rested on their refusals to supply relevant information, no question was presented as to whether a discharge might be based on information in an affidavit, such as an admission of past membership in the Communist Party.[203]

A bare majority of the Court justified the oath on somewhat different grounds.[204] The 1941 charter amendment was said to deny city employment to any persons who thereafter should fail to comply with its requirements of loyalty. The oath did not have a retrospective operation because it implemented the charter amendment, imposing the identical standard in the form of an oath covering the period 1945-1948. Nor was it invalid as a bill of attainder since it did not inflict punishment, but "merely provide[d] standards of qualification and eligibility for employment."[205] A contention that the oath violated the due process clause because it was not limited to knowing membership in the proscribed organizations was avoided by an adroit rewriting of the municipal ordinance. The ordinance did not in terms require *scienter;* nevertheless the Court assumed that *scienter* was implicit in each clause of the oath. Mr. Justice Frankfurter, believing that it was improper for the Court to imply such a requirement in the absence of a state court interpretation, dissented from this portion of the case. Justices Black, Douglas and Burton also dissented from the Court's validation of the oath, arguing that it was invalid as a bill of attainder since it operated retrospectively as a perpetual bar to employees who held certain views at any time since a date five years preceding the effective date of the ordinance.

The *Garner* case, therefore, is a square holding that present or recent membership in the Communist Party or any other organization with illegal objectives is relevant to the fitness of persons for public employment, and that a refusal to supply information relating to such membership or to take an oath of non-membership is grounds for discharge from public employment. A necessary presupposition to this holding is that "No unit of government can be denied the right to keep out of its employ those who seek to overthrow the government by force or violence, or are knowingly members of an organization engaged in such endeavor."[206]

Gerende v. *Board of Supervisors*[207] and *Adler* v. *Board of Education*[208] applied similar principles to related situations. The *Gerende* case indicated that eligibility for elective office could be conditioned on the execution of a loyalty oath negating knowing membership in organizations engaged in an attempt to overthrow the government by force and violence. The *Adler* case, validating an involved statutory scheme which sought to bar from employment in the public schools persons who advocate, or belong to organizations which advocate, the overthrow of the government by unlawful means, is a less satisfactory precedent. The Court's opinion appears to rely heavily on the "privilege" concept and contains broad language which the Court certainly no longer accepts.[209] Secondly, as Mr. Justice Frankfurter pointed out in his dissenting opinion, the Court upheld the statutory scheme before it had been applied against any individuals or interpreted by the state courts, thus violating the Court's self-imposed jurisdictional limitations of standing and ripeness.

Each of these cases contained strong intimations that a loyalty oath or other procedure which disqualified individuals on the basis of innocent membership in the Communist Party would be invalid.[210] *Wieman* v. *Updegraff*[211] fulfilled these intimations by holding that "Indiscriminate classification of innocent

with knowing activity" is an "assertion of arbitrary power" which violates the due process clause of the fourteenth amendment.[212] An Oklahoma statute required state officers and employees to take a loyalty oath that they were not and for five years immediately preceding the taking of the oath had not been affiliated with or members of organizations on the Attorney General's list of subversive organizations. The Court interpreted state court decisions involving the oath as construing it so as to exclude persons solely on the basis of organizational membership, regardless of their knowledge concerning the organization. The innocent member thus received the same treatment as the person aware of illegal purposes. The Court was unanimous in holding that membership in organizations advocating overthrow of government, if it is to be the ground for disqualification from public employment, must be a *knowing* membership.

The *Wieman* case was a harbinger of the future in several respects. Concurring opinions of Mr. Justice Black and Mr. Justice Frankfurter, joined by Mr. Justice Douglas, emphasized that the loyalty oath was being applied to teachers and expressed their views that freedom of expression was imperiled by loyalty oaths and that any such impact on the educational system should be subjected to great scrutiny. That three members of the Court should express themselves so strongly indicated, as the *Sweezy* case[213] tended to prove, that academic freedom will be given first amendment protection against impairment by state authorities. Perhaps even more important is the Court's unanimous view that eligibility for public employment can only be conditioned on requirements which have a rational relationship to fitness. The Court is thus committed to a review and assessment of state-imposed limitations on public employment. The extension of this requirement to state-imposed limitations on private employment in *Schware* v. *Board of Bar Examiners*[214] should not have been surprising.

Disqualification from Private Employment

In earlier days of occupational licensing, the Supreme Court reviewed state limitations which restricted occupational choice with an erratic but recurring zeal.[215] The right of a citizen "to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling . . ."[216] were among the rights protected against state action by the due process clause of the fourteenth amendment. But even in these earlier days of judicial activism in the review of state economic legislation, it was unquestioned that the states, in order to protect the public, could impose reasonable restraints on a citizen's freedom to choose his work.[217] And in more recent years the Supreme Court has virtually abdicated judicial review of state licensing statutes.[218] The states, it was said, could regulate any occupation provided the regulation had some reasonable basis in a public interest. Since a tenable argument can be made in almost any case that the public health, welfare, safety, or morals is adversely affected by "unfit" persons engaging in the restricted work or by "unfair practices" which the regulation aims to prevent, few occupational licensing statutes have been subjected to successful constitutional attack. The Court's application of a presumption that conditions exist which support the legislative judgment,[219] and its refusal to inquire into legislative motives, have limited the scope of review to a point where regulatory schemes involving the most invidious discriminations have been upheld.[220] Unless *Schware* v. *Board of Bar Examiners*[221] is based solely on the fact that a former Communist was involved, it would seem to indicate that the Court may reenter the occupational licensing field and strike down licensing requirements which have little or no rational relation to fitness for the occupation in question.

Schware, after graduating from law school, petitioned the New Mexico board of Bar Examiners for permission to take the 1954 bar examination. The Board, after a hearing, denied permission on the ground that he had failed to show the good moral character required by statute of applicants to the bar. The New Mexico Supreme Court affirmed the denial,[222] and the Supreme Court, in an opinion by Mr. Justice Black, reversed.[223] The Court concluded that the denial offended due process because there was no evidence which rationally justified the state's finding that Schware was morally unqualified for the practice of law. Mr. Justice Frankfurter, joined by Justices Clark and Harlan, concurred on the ground that the state court was unwarranted in concluding that Schware's past communist affiliation made him "a person of questionable character."

The *Schware* case is significant in several respects. First, as noted above, it indicates that freedom of occupational choice is an important freedom which is protected by the due process clause. The *Wieman* case[224] established that public employment was not a "privilege" which could be denied for any reason whatsoever. Now it appears that a similar protection is to be accorded to persons arbitrarily excluded from the occupation of their choice. My own view is that this is neither an unfortunate nor an incorrect development. The freedom to choose work of one's choice is surely a most important freedom, whether it be considered as "property" or "liberty." The mushrooming of occupational restrictions in the United States, the increasing tendency to allow regulated groups to control entry into various occupations, and the growing

irrelevancy to fitness of many of the requirements which have been imposed combine to greatly restrict occupational freedom.[225] Many young Americans who can aspire to be President of the United States must resign themselves to the fact that they cannot become barbers, carpenters, chiropodists, electricians, funeral directors, hypertrichologists, pharmacists, photographers, plumbers, and veterinarians, among others. Perhaps it is time that the multiplying restrictions on occupational choice were subjected to the basic requirements of decency and rationality emanating from the due process clause of the fourteenth amendment.

More questionable, however, is the willingness of the majority of the Court in the *Schware* case to undertake an independent determination of the facts. The case did not involve a legislative preclusion of a class of persons, as in *Wieman*, but a factual determination that a particular individual did not meet an accepted standard—good moral character. The New Mexico bar examiner and the New Mexico Supreme Court had based their conclusion that Schware had failed to show good moral character on Schware's use of aliases, his record of arrests, and his past membership in the Communist Party. The Court considered each of these factors in detail and rejected each as rationally justifying the finding.

Schware had used aliases between 1933 and 1937 in order to obtain work and to further his efforts as a labor organizer; his arrests on various charges had been adequately explained and in each instance the charges had been dropped; and he had been a member of the Communist Party from 1932 to 1940, but had had no connection with communist activities since that time. The Court concluded that the use of aliases for a lawful purpose did not reflect on moral character; that arrests without convictions were of slight probative value; and that membership in the Communist Party during a period when it was a lawful political party, absent any showing that Schware was aware of possible illegal purposes or participated in illegal acts, could not serve as the basis for a finding of bad moral character, especially when the persuasive evidence of present good character in the record was taken into account.

The air of reasonableness prevading the Court's opinion should not obscure the fact that the technique and scope of constitutional review was at issue. Should the Court, in constitutional cases, make an independent assessment of the facts on the basis of a reading of the record, rejecting the demeanor evidence relied on by the trier of fact? The Court has done this for a good many years in coerced confession cases.[226] Perhaps the Court feels that when such issues are involved popular pressure and prejudice against minority groups combine to decrease the ability of state courts to determine the facts fairly. And the Court may have a similar fear when Communists are involved.

Of course, the absence of any evidence in a record to support an essential finding of fact is itself a question of law. A finding without a rational basis is an arbitrary and lawless finding, and subject to attack as such under the due process clause. Whenever constitutional issues are presented, the Court, in order to preserve its own power to determine such issues with finality, must retain the power to look beyond the findings of the state court. Thus the power exists and is necessary, but situations calling for its exercise should be rare. In the vast majority of cases coming from state courts, the Court should and does give deference to and follow the findings of fact of the state court.[227]

It is doubtful if the *Schware* case is one of those extraordinary cases where the Court should look beyond the factual determinations of the state court. Demeanor evidence should play an important part in determinations of moral character. The bar examiners, as the triers of fact, were free to reject some or all of Schware's self-serving testimony. It is for these reasons that the concurring opinion of Mr. Justice Frankfurter, joined by Justices Clark and Harlan, is founded on sounder ground.

Mr. Justice Frankfurter read the opinion of the New Mexico Supreme Court as based primarily on its belief that "one who has knowingly given his loyalties to such a program and belief [communism] for six to seven years during a period of responsible adulthood is a person of questionable character."[228] To draw an inference of present unsuitability from the fact that a person had been a member of the Communist Party fifteen years before, at a time when such membership was not only lawful but fashionable, was "so dogmatic an inference as to be wholly unwarranted."[229] Although it was beyond the function of the Court "to act as overseer of a particular result on the procedure established by a particular State for admission to its bar,"[230] what the state had done, in effect, was to create an irrebutable presumption of bad moral character from the fact of past Communist Party membership. This the due process clause prohibited.

A Right to Silence?

Observers of the onward march of security tests for public and private employment have asserted with regret that the typical casualty of such measures was not a hardened Communist but a loyal citizen of conscientious scruples.[231] Although this observation is incapable of proof, it does seem likely that the net cast for subversives has brought forth many innocent fish. Of course, if the security measure invades the privacy of the conscience, the first amendment may allow the individual to remain silent.[232] Religious inquiries are

the most obvious case, but similar protection may be accorded to political beliefs and to academic discussion. The *Sweezy* case[233] indicates that inquiries concerning lawful political activities such as the Progressive Party in 1948 and intellectual exchange such as the academic discussion of socialism will be restricted. Even where the first amendment provides no protection, the requirement that membership or conduct have taken place with knowledge of unlawful purposes tends to protect the innocent.[234] Substantial disqualifications cannot be predicated on mere guilt by association. But these approaches may still not be sufficient to safeguard the sincere individual who refuses on principle to take an oath, sign an affidavit, or cooperate in what he feels is an unjust and unlawful inquiry. The impact of security measures on the conscientious objector thus raises the complex issue of whether there is a right to silence.

The problem has several dimensions. First, does the Constitution entitle the conscientious objector to special treatment? On principle, the answer seems clear. If the state has not invaded the area protected by the first amendment, and the measure in its general application meets the requirements of the due process clause, the individual who objects to it on grounds of conscience is entitled to no more consideration than is received by those persons the legislature sought to penalize. Second, there is the problem of what inferences may be drawn from a refusal to cooperate. Most security measures do not contain specific provisions for the non-cooperative individual, and the usual device has been to infer misconduct from a refusal to answer relevant questions and even from a claim of the privilege against self-incrimination. Is this permissible? Finally, there is the problem of identification: when is an individual acting in good faith? If security measures were drafted in such a fashion that a good faith exercise of conscience would except an individual from their application, this issue would be determined by state agencies in the same manner as other factual issues. But existing security measures fail to make specific provision for the stubborn man of principle. Yet there may be a judicial desire to exempt such an individual from the general operation of loyalty tests. Important issues of judicial review are raised when the Supreme Court makes independent factual determinations of such ambiguous matters as "good faith" or "good moral character."

The Court has not yet had a full opportunity to explore all of these questions. Moreover, in those cases in which the questions have arisen the Court has been bitterly divided. The absence of a stable majority and recent changes in the personnel of the Court make it likely that further change will take place. A survey of existing cases, accompanied by a few comments for the future, is all that will be attempted here.

In the first few of the recent cases involving the impact of loyalty tests on the conscientious objector, the Court proved unreceptive to claims of a right to silence,[235] which was usually said to emanate from the first amendment. The first case bearing on the existence and dimensions of a due process clause "right to silence" was *Slochower* v. *Board of Education*,[236] involving the discharge of a public school teacher following his claim of the privilege against self-incrimination before a congressional committee. The Court held, 5-4, that a discharge predicated on the invocation of the fifth amendment before a congressional committee violated the due process clause. The majority opinion roundly condemns any imputation of guilt based on the use of the fifth amendment, and contains broad language to the effect that the due process clause protects any invocation of a constitutional right. Although the language of the opinion suggested that a good faith refusal on constitutional grounds to answer questions would be protected, the holding of the case would appear to be more narrowly confined to its peculiar facts.

Slochower, a professor with long experience and good record at Brooklyn College, was suspended shortly after he had invoked the fifth amendment before a Senate subcommittee. Section 903 of the New York City charter made his dismissal automatic. Since the Senate inquiry at which Slochower invoked the privilege was not directed to his fitness to hold a teaching position and the state had not asked him for an explanation for his use of the privilege, the Court was able to interpret the state action as based on an automatic inference of guilt arising from the exercise of the constitutional privilege.[237] Thus the case did not decide that a state cannot discharge an employee for refusal to answer inquiries relevant to his fitness directed to him by state officials.[238] Nor did it decide that a state cannot draw an inference from a failure of a state employee to adequately explain the use of the privilege.

About a year later, when the Supreme Court decided *Konigsberg* v. *State Bar of California*,[239] it appeared that the dicta of the *Slochower* opinion had become constitutional doctrine. Konigsberg had been denied admission to the California bar on the grounds that he had failed to prove (1) that he did not advocate overthrow of the government of the United States or of California by unconstitutional means, and (2) that he was of good moral character. The record, which contained testimonials from 42 persons as to Konigsberg's good character, also contained testimony that Konigsberg had attended Communist Party meetings in 1941 and had written a vitriolic series of

articles criticizing public officials and their policies. Konigsberg answered the direct question, "Do you advocate overthrow of the government of the United States or of this State by force or violence or other unconstitutional means?" in the negative, but refused on first amendment grounds to answer any other questions relating to his political beliefs and associations. The California Supreme Court declined to review Konigsberg's petition, without opinion,[240] and, on certiorari, the Supreme Court reversed.

Mr. Justice Black, speaking for a majority of five, reviewed the record in detail, as he had done in *Schware,* and concluded that there was no evidence rationally justifying the findings of the bar examiners. Mr. Justice Frankfurter dissented on jurisdictional grounds, urging that the case should be remanded to the state court for a certification of the grounds of its declination to review. Mr. Justice Harlan, joined by Mr. Justice Clark, dissented both on the jurisdictional issue and on the merits.

The majority opinion of Mr. Justice Black comes very close to holding that a state cannot draw unfavorable inferences from a mistaken but honest refusal to answer relevant questions. While intimating that it would be unconstitutional for admission to the bar to be denied solely on the basis of a good faith refusal to answer, decision of this issue was avoided with the explanation that California had not based the denial on this ground. Yet this was done only by ignoring the insistence placed on this matter by the bar examiners and by finding, contrary to the implied finding of the state, that the refusal to cooperate was in "good faith." Although the majority did not question the state rule that the applicant has the burden of proving his fitness, the decision must be interpreted either as ignoring the burden of proof or as holding that the applicant satisfies the burden by introducing testimonial letters with respect to good moral character. In either event, the state is required to produce affirmative evidence of present lack of moral character in order to deny admission, and the lack of such evidence deprives the findings of any rational basis and thus offends due process. The applicant's refusal to cooperate can apparently be given little if any significance.

Mr. Justice Harlan's dissenting opinion[241] demonstrates in convincing fashion that the majority misconceived the question at issue. The majority stated the issue as being whether the record contained evidence establishing that Konigsberg had a bad moral character. His refusal to answer any questions other than his bare denial that he did not advocate overthrow of government by unconstitutional means was treated as raising an entirely separate question, and, since the state had not rested its denial of admission *solely* on that ground, was given no significance whatsoever. Mr. Justice Harlan's detailed analysis of the record, however, leaves little doubt that Konigberg's refusal to supply the bar examiners with the information they needed to make a determination with respect to his moral character was a crucial element in the examiners' decision that Konigsberg had not carried his burden of proof.

The implications of the *Konigsberg* case for the technique of judicial review would be somewhat alarming if it were not for the fact that subsequent decisions have greatly reduced its significance.[242] As things presently stand, the case evidences a willingness on the part of some members of the Court to make independent factual determinations from a printed record of such delicate matters as whether a person's refusal to answer questions was honest even though mistaken. For the *Konigsberg* majority seems to be saying that if an individual's refusal to cooperate is found—by a majority of the Supreme Court—to be in good faith, and the record does not contain other evidence which in itself warrants the result reached by the state, the action of the state must be set aside.[243] Thus *Konigsberg* is a much more far-reaching holding than *Schware,*[244] which holds only that a state cannot disqualify a person from engaging in the occupation of his choice unless the basis for disqualification has a rational relation to unfitness for the occupation.

The vicissitudes during the Supreme Court's 1957 Term of the right to silence which the *Konigsberg* case appeared to recognize demonstrated once again the particularity with which constitutional development takes place. In *Beilan* v. *Board of Public Education,*[245] a public school teacher was discharged for "incompetency" after many years of satisfactory service because of a 1953 refusal to answer any questions put to him by his superior relating to past membership in communist groups. The issue seemingly decided by *Konigsberg* was cleanly posed: May a state discharge a person solely on the basis of a refusal to answer relevant questions, or is it necessary that there be other affirmative evidence of unfitness? A differently constituted majority found the answer almost self-evident—it was permissible for a state to draw an inference of unfitness or lack of dependability from a refusal to answer relevant questions.

The *Beilan* and *Konigsberg* cases seem to be incompatible in principle as well as spirit.[246] The Court's opinion in *Beilan* attempted to distinguish *Konigsberg* by stating that the action of the state in *Konigsberg* "was not based on the refusal to answer relevant questions—rather, it was based on inferences impermissibly drawn from the refusal," whereas in *Beilan* "no inferences at all were drawn from petitioner's refusal to

answer."[247] The refusal itself operated to effectuate the discharge. This attempted distinction fails to penetrate beneath the surface of either case, treating one as wholly a refusal-to-answer case and the other as an impermissible-inference case. Categorization as one or the other appears to depend on nothing more than the verbal choices made by the state court. Thus *Konigsberg*, although it remains as a case which a future Court may build on, is reduced in import because its application can be so easily avoided.

A companion case to *Beilan, Lerner* v. *Casey*,[248] dealt more directly with the permissible inference that can be drawn from the use of the privilege against self-incrimination.[249] Lerner, a New York City subway conductor, was discharged by the Transit Authority because of the doubt created as to his "reliability" by his claim of the privilege against self-incrimination when asked by city officials concerning current membership in the Communist Party. The Court held, again 5-4, that the inference of unreliability was permissible.[250] The *Slochower* case was distinguished on the valid grounds that Lerner had been questioned by state rather than federal officers; that these officers had authority to ask questions relating to subversive activity in connection with fitness for employment; and that the state had not made an inference of disloyalty from the use of the privilege, but only of "unreliability." The Court also emphasized that the fifth amendment privilege was not available to Lerner in a state investigation, and hence the state had as much right to discharge him for failure to answer as it would have had in the absence of a claim of privilege.

It should be noted that the questions put to Lerner related to current rather than past membership in the Communist Party. If a refusal to answer under such circumstances had not been treated as permitting an inference of unfitness, the Court would have traveled full circle, and the states' power to exact information relating to subversive activity from its employees, established in the *Garner* case, would have become completely illusory.

Conclusion

Despite the evolving uncertainty in this field, certain generalizations can be made. If a state proves, or the individual admits, present membership in the Communist Party or actual participation in illegal activities, there is little doubt of the state's power to impose civil disqualifications.[251] When past membership is involved, the state must restrict its disqualification to situations in which the membership was with knowledge of the illegal purposes of the organization.[252] And even knowing membership will not serve as the basis for disqualification if that membership, since terminated, was a number of years ago during a period when the Communist Party was a lawful and recognized political party in most of the states.[253] The opposite conclusion, permitting a state to disqualify a person on the basis of such remote activities, is thought to have little or no relevance to present fitness and to involve the dangers of a bill of attainder in that it permanently disqualifies, with no opportunity for rehabilitation.[254]

Even more difficult issues arise when the disqualification is not based on any affirmative evidence of past or present subversive activity, but is grounded solely or primarily on a refusal of the individual to supply information relevant to his fitness. The situations that may arise are so varied that generalization is dangerous. But it seems likely that the following factors will be given consideration: the degree of relevance of the questions asked to present fitness; the grounds upon which the refusal to cooperate is based; whether or not the inquiry is made by a state officer and is concerned with the individual's fitness; and, finally, the other evidence relating to fitness contained in the record. Other considerations which may influence decision are the degree of severity of the disqualification sought to be imposed; the extent to which procedural safeguards are provided before the imposition of the disqualification; and the impact of the statutory scheme on first amendment rights.

The emerging constitutional principles seem to be (1) that innocent conduct must be distinguished from guilty conduct; (2) that conduct in the past must be considered not as absolutely disqualifying, but with respect to its relevance to present fitness; (3) that imposition of substantial disqualifications cannot be based on beliefs as distinguished from conduct; and (4) that conscientious refusals to cooperate will be given an uncertain degree of protection.

These principles are an expansion of prior doctrine and evidence a willingness on the part of the Supreme Court to take a more active role in policing state attempts to impose disqualifications on subversives. Yet the development thus far has not crippled or seriously impaired state power. It is to be noted that the Court has avoided resting its decisions on the power of the states to deal with issues of subversion and loyalty. Instead, in addition to interpreting congressional action so as to displace state authority, the Court has used the due process clause of the fourteenth amendment to enforce a strict procedural regularity. The Court also has been notably reluctant to predicate its decisions on first amendment grounds, though free speech considerations have influenced it in many of the cases. If issues of subversion and loyalty continue to be an important sphere of state concern, it is likely that present trends of decision will continue.

FOOTNOTES

[1] Pennsylvania v. Nelson, 350 U. S. 497 (1956).

[2] The development in a number of states is summarized in Gellhorn, The States and Subversion (1952). Information and enlightenment concerning the social and legal implications of widespsread use of security tests for public and private employment are available in a number of books. The best as well as the most recent is Brown, Loyalty and Security (1958). The state legislation as of 1955 is summarized and described in plentiful detail in Fund for the Republic, Digest of the Public Record of Communism in the United States 241-488 (1955) (hereafter cited as "Digest").

[3] *Amicus curiae* brief for the United States at 30, n. 19, Pennsylvania v. Nelson, 350 U. S. 497 (1956).

[4] See Brown, Loyalty and Security, C. 7 (1958).

[5] It should go without saying that any criticism of Supreme Court doctrine or of particular Supreme Court decisions is not meant to reflect on the integrity or ability of the justices or to indicate sympathy with any attacks made upon them. On the contrary, such criticisms as are made here are put forth tentatively and respectfully in the hope that they may appeal to the intelligence of a future day.

[6] 350 U. S. 497 (1956).

[7] For a summary and description of the state sedition statutes existing as of January 1955, see "Digest," op. cit. supra note 2, at 266-306 (1955).

[8] The proposals have been of two kinds. Most of the proposed bills would reverse the Nelson case by providing that the various federal communist control measures "shall not prevent the enforcement in the courts of any State of any statute of such state prescribing any criminal penalty for . . . sedition against such State or the United States . . . " See, e.g., Sen. 2646, 85th Cong., 2d Sess. (1958), which failed of enactment by a close Senate vote. 104 Cong. Rec. 17788 (1958). A statute of this type presents a constitutional question only if sedition against the United States is not within the exclusive powers of the federal government. The present writer's view is that legislative reversal of the Nelson case, whatever one's view of the Court's use in that case of preemption doctrine, would be unwise as a policy matter.

A more drastic type of proposal would establish a general rule of construction against supercession of state laws. See, e.g., Sen. 3143, 84th Cong., 2d Sess. (1956). The Department of Justice has consistently opposed any broad enactment on the unassailable ground that unforeseen effects on numerous federal programs might result. For an analysis of the problems raised by measures of this broader kind, see Wham and Merrill, Federal Pre-emption: How To Protect the States' Jurisdiction, 43 A.B.A.J. 131 (1957).

[9] Useful comments on the general problem of preemption when overlapping criminal statutes are involved are Hunt, Federal Supremacy and State Anti-Subversive Legislation, 53 Mich. L. Rev. 407 (1955); Note, Pre-emption by Federal Criminal Statutes, 55 Col. L. Rev. 83 (1955); Grant, The Scope and Nature of Concurrent Power, 34 Col. L. Rev. 995 (1934).

[10] Commonwealth v. Nelson, 172 Pa. Super. 125, 92 A. 2d 431 (1952).

[11] Commonwealth v. Nelson, 377 Pa. 58, 104 A. 2d 133 (1954).

[12] 350 U. S. 497 (1956). Justices Reed, Burton, and Minton dissented, in an opinion written by Mr. Justice Reed.

[13] 18 U. S. C. §2385 (1952).

[14] C. 1024, 64 Stat. 987 (1950) (codified, as amended, in scattered sections of 8, 18, 22, 50 U. S. C.).

[15] C. 886, 68 Stat. 775 (1954) (codified in scattered sections of 50 U. S. C.).

[16] 350 U. S. 497, 502, quoting from Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 230-31 (1947).

[17] Id., at 504.

[18] Id., at 505.

[19] Id., at 504.

[20] Ibid.

[21] Id., at 509-510.

[22] But cf. Houston v. Moore, 5 Wheat. (U. S.) 1, 22-23 (1820) (invalidating state statute but sustaining state court martial conviction for militiaman's *federal* offense); Prigg v. Pennsylvania, 16 Pet. (U. S.) 539, 617-618, 636 (1842) (invalidating state criminal statute interfering with constitutionally guaranteed right of slaveowner to recapture his fugitive slave); In re Heff, 197 U. S. 488, 506-508 (1905) (invalidating *federal* law which subjected Indian allottees to both federal and state liquor statutes). These cases, each of which contains strong statements in support of the view that enactment of a federal criminal statute automatically supersedes a concurrent state criminal statute, are unsatisfactory as precedents because (1) each was ultimately decided on another ground, and (2) subsequent decisions have ignored them or rejected the dicta contained in them. In re Heff was explicitly overruled by United States v. Nice, 241 U. S. 591 (1916).

[23] The Supreme Court's doctrine of preemption, particularly as applied in commerce clause case, is discussed in Dunham, Congress, the States and Commerce, p. 54 infra; Note, "Occupation of the Field" in Commerce Clause Cases, 1936-1946, 60 Harv. L. Rev. 262 (1946); Note, Supersedure of State Laws by Federal Regulations under the Commerce Clause, 86 U. of Pa. L. Rev. 532 (1938). See also Braden, Umpire to the Federal System, 10 U. of Chi. L. Rev. 27 (1942), and Sholley, The Negative Implications of the Commerce Clause, 3 U. of Chi. L. Rev. 556 (1936).

[24] U. S. Const., Art. 1, §8.

[25] U. S. Const., Art. 1, §8, cls. 11-14.

[26] U. S. Const., Art. 4, §4.

[27] See Gilbert v. Minnesota, 254 U. S. 325, 328-331 (1920).

[28] Barton v. City of Bessemer, 234 Ala. 20, 173 So. 628 (1937); Commonwealth v. Lazar, 103 Pa. Super. 417, 157 Atl. 701 (1931); People v. Lloyd, 304 Ill. 23, 136 N. E. 505 (1922); State v. Hennessy, 114 Wash. 351, 195 Pac. 211 (1921); People v. Steelite, 187 Cal. 361, 203 Pac. 78 (1921); State v. Tachin, 92 N. J. L. 269, 106 Atl. 145 (1919), appeal dismissed, 254 U. S. 662 (1920); State v. Holm, 139 Minn. 267, 166 N. W. 181 (1918); State v. Kahn, 56 Mont. 108, 182 Pac. 107 (1907); People v. Most, 171 N. Y. 423, 64 N. E. 175 (1902); State v. McKee, 73 Conn. 18, 46 Atl. 409 (1900).

[29] 254 U. S. 325 (1920).

[30] 40 Stat. 219 (1917), as amended, 18 U. S. C. §2388 (1952).

[31] 350 U. S. 497, 501. Gilbert had spoken at a public meeting. His remarks were resented and a threat of disorder was thought to be presented. But cf. DeJonge v. Oregon, 299 U. S. 353 (1937).

[32] That a broader ruling was intended is shown by the Court's reliance on the *Gilbert* case in dismissing the appeal of Tachin v. New Jersey, 254 U. S. 662 (1920). The defendants in that case had been convicted of sedition for asserting that the United States had entered World War I for the benefit of certain capitalistic interests. The state court held that the state could punish the acts under its own law even though the offense was directed solely against the United States. "Primarily sedition against the United States is a crime against the federal government, which is the direct subject of attack;

but under our system the federal and state governments are so closely interwoven that an attack on the former may imperil the existence of the latter." State v. Tachin, 92 N. J. L. 269, 271-272, 106 Atl. 145, 147 (1918).

[33] 312 U. S. 52 (1941).

[34] 54 Stat. 673, 8 U. S. C. §451 et seq. (repealed June 27, 1952).

[35] 18 U. S. C. §2385 (1952).

[36] 50 U. S. C. §781 et. seq. (1952).

[37] 50 U. S. C. (1955 Supp.) §841.

[38] Id., at §843.

[39] 336 U. S. 725 (1949).

[40] 12 U. S. C. §§1 - 1831 (1952).

[41] 18 U. S. C. §2113 (1952).

[42] See Jerome v. United States, 318 U. S. 101 (1943); People v. Candelaria, 139 Cal. App. 2d 432, 294 P. 2d 120 (1956); State v. Cioffe, 130 N. J. L. 160, 32 A. 2d 79 (1943); In re Morgan, 80 F. Supp. 810 (D. Iowa, 1948).

[43] 350 U. S. 497, 518.

[44] 312 U. S. 52 (1941).

[45] Preemption cases may be divided into three general classes, each of which has been accorded somewhat different treatment because of the differing policy considerations that are applicable. (1) Where federal and state statutes are in *conflict* in the sense that compliance with one necessarily constitutes violation of the other. (2) Where a state pattern of regulation *deviates* from the federal pattern, without directly conflicting. The state regulation may differ in that it imposes an additional requirement on the same matter, *or* in that it closes a gap in the federal scheme by regulating a closely related matter. (3) Where federal and state statutes *coincide* by requiring or forbidding exactly or substantially the same thing. A similar classification is suggested in Sholley, Cases on Constitutional Law 946-47 (1951). For a more detailed discussion of the various kinds of preemption cases, and the differing problems they present, see text at notes 121 - 133, *infra*.

[46] 50 U. S. C. §783 (1952).

[47] Id., at §§781, 782, 786 - 793 (1952).

[48] Id., at §794 (1952).

[49] Id., at §§782, 784, 786, 789, 790, 791, 792a, 793, 841 - 857 (1955 Supp.)

[50] The Pennsylvania Supreme Court considered only the effect of the Smith Act. 377 Pa. 58, 104 A. 2d 133. Although the Supreme Court stated that the question for decision was whether the Smith Act "supersedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct," 350 U. S. 497, 499, the Court considered the case as involving the impact of *all* federal communist control measures on state power, not only the Smith Act.

[51] Fox v. Ohio, 5 How. (U. S.) 410 (1847); United States v. Marigold, 9 How. (U. S.) 560, 569 (1850); Moore v. Illinois, 14 How. (U. S.) 13, 19-20 (1852); Ex parte Siebold, 100 U. S. 371, 389-391 (1879); Gilbert v. Minnesota, 254 U. S. 325, 329-330 (1920); United States v. Lanza, 260 U. S. 377, 382 (1922); California v. Zook, 336 U. S. 725, 731 (1949).

[52] See, *e.g.*, Gitlow v. New York, 268 U. S. 652, 668 (1925); Whitney v. California, 274 U. S. 357 (1927).

[53] 350 U. S. 497, 508.

[54] Id., at 498 n. 2.

[55] Id., at 507.

[56] Id., at 509-10.

[57] Mr. Justice Story in Houston v. Moore, 5 Wheat. (U. S.) 1, 72 (1820) (dissenting opinion).

[58] Hebert v. Louisiana, 272 U. S. 312 (1926).

[59] United States v. Lanza, 260 U. S. 377 (1922).

[60] Feldman v. United States, 322 U. S. 487 (1944).

[61] Weeks v. United States, 232 U. S. 383 (1914). Cf. Gambino v. United States, 275 U. S. 310 (1927).

[62] United States v. Coolidge, 1 Wheat. (U. S.) 415 (1816); United States v. Hudson & Goodwin, 7 Cranch (U. S.) 32 (1812). But cf. 2 Crosskey, Politics and the Constitution 764-84 (1953).

[63] See Hart and Wechsler, The Federal Courts and the Federal System 1090-95 (1953).

[64] See Schwartz, Federal Criminal Jurisdiction and Prosecutors' Discretion, 13 Law & Contemp. Prob. 64 (1948), where the development of federal criminal jurisdiction is traced.

[65] Two reconstruction era measures anticipated the later development. Civil Rights Acts of 1866, 14 Stat. 27, and 1870, 16 Stat. 140, 144; Post Office Code of 1872 (mail fraud, lottery by mail), 17 Stat. 283, 302, 323.

[66] Cf. Schwartz, op. cit. supra note 64, at 73.

[67] United States v. Amy, 24 Fed. Cas. 792, No. 14,445 (C. C. Va., 1859), is the leading case (dictum of Mr. Chief Justice Taney). See also Quinn v. State, 95 So. 2d 273 (Ala. App., 1957); Ex parte Groom, 87 Mont. 377, 381-382, 287 Pac. 638, 639 (1930); In re Van Dyke, 276 Mich. 32, 267 N. W. 778 (1936); Commonwealth v. Ponzi, 256 Mass. 159, 152 N. E. 307 (1926); State v. Stevens, 60 Mont. 390, 199 Pac. 256 (1921); State v. Feree, 88 W. Va. 434, 437, 107 S. E. 126, 127 (1921); People v. Burke, 161 Mich. 397, 126 N. W. 446 (1910); Hayner v. State, 83 Ohio 178, 93 N. E. 900 (1910); State v. Moore, 143 Iowa 240, 241-242, 121 N. W. 1052, 1053 (1905); State v. Morrow, 40 S. C. 221, 18 S. E. 853 (1893).

[68] See cases cited note 51, supra.

[69] See text accompanying notes 77-92, infra.

[70] Several federal criminal statutes contain a clause providing that a state conviction or acquittal shall act as a plea in bar in the federal court. See 18 U. S. C. §659 (1952) (embezzlement or theft of baggage from interstate commerce); 18 U. S. C. §660 (1952) (embezzlement of funds of interstate carriers); 18 U. S. C. §1992 (1952) (wrecking of trains); 18 U. S. C. §2117 (1952) (breaking into interstate carrier with intent to steal).

[71] Cf. Schwartz, op. cit. supra note 64, at 71-73.

[72] Hines v. Davidowitz, 312 U. S. 52 (1941); Houston v. Moore, 5 Wheat. (U. S. 1, 31 (1820). Cf. Zook v. California, 336 U. S. 725, 740, 752 (1949) (dissenting opinion).

[73] United States v. Lanza, 260 U. S. 377 (1922). In Puerto Rico v. Shell Co., 302 U. S. 253 (1937), it was held that the double jeopardy clause barred double prosecution for the same conduct by the United States and its subordinate government in a territory. In Jerome v. United States, 318 U. S. 101, 105 (1943), possible double punishment was given as a reason for narrow construction of a federal criminal statute. In the *Nelson* case the Court was careful to say that "we do not reach the question whether double or multiple punishment for the same overt acts . . . has constitutional sanction," citing an article which severely criticizes the *Lanza rule*. 350 U. S. 497, 509.

[74] Bartkus v. Illinois, No. 1, October Term, 1958. See People v. Bartkus, 7 Ill. 2d 134, 130 N. E. 2d 187 (1955), cert. granted, 352 U. S. 907 (1956), aff'd by an equally divided court, 355 U. S. 281 (1958) (Mr. Justice Brennan not participating), judgment vacated and case restored for reargument, 356 U. S. 969 (1958).

[75] Abbate v. United States, No. 7, October Term, 1958. See

247 F. 2d 410 (C. A. 5, 1957), cert. granted, 355 U. S. 902.
[78] If the state statute expresses a separate and distinct state interest, it is arguable that the state is free to enforce its own law without regard to federal action. See Fox v. Ohio, 5 How. (U. S.) 410 (1847); United States v. Cruikshank, 92 U. S. 542, 550-551 (1875); Ex parte Siebold, 100 U. S. 371, 393 (1879); Screws v. United States, 325 U. S. 91 (1945).
[77] 350 U. S. 497, 501 n. 10.
[78] 18 U. S. C. §3231 (1952).
[79] 350 U. S. 497, 501 n. 10.
[80] Without this provision it would not have been certain that state courts could not punish for federal offenses. See Houston v. Moore, 5 Wheat. (U. S.) 1 (1820) (sustaining state court martial conviction for militiaman's federal offense; state can prosecute federal offenses when Congress has not given exclusive jurisdiction to the federal courts). See also Tennessee v. Davis, 100 U. S. 257 (1880) (sustaining removal of state criminal prosecution of federal revenue officer to federal court); Testa v. Katt, 330 U. S. 386 (1947) (requiring state to entertain wartime price control treble-damage action even though a "penal" law). See Note, Utilization of State Courts to Enforce Federal Penal and Criminal Statutes, 60 Harv. L. Rev. 966 (1947).
[81] 1 Stat. 73 (1789).
[82] 2 Stat. 404 (1806); 2 Stat. 423 (1807).
[83] 4 Stat. 122, §26 (1825).
[84] Rev. Stat. §5328 (1878).
[85] 35 Stat. 1151 (1909).
[86] See reviser's note to 18 U. S. C. §3231.
[87] Ibid.
[88] 189 U. S. 319 (1903). See also In re Dixon, 41 Cal. 2d 756, 264, P. 2d 513 (1953) (counterfeiting); State v. Duncan, 221 Ark. 681, 255 S. W. 2d 430 (1953) (fraudulent sale of mortgaged property); Natasi v. Aderhold, 201 Ga. 237, 39 S. E. 2d 403 (1946) (counterfeiting); People v. Welch, 141 N. Y. 266, 36 N. E. 328 (1894) (manslaughter by officer of vessel).
[89] 189 U. S. 319, 323.
[90] Id. at 324-25.
[91] 18 U. S. C. §2385 (1952).
[92] 350 U. S. 497, 519.
[93] Commonwealth v. Gilbert, 334 Mass. 71, 134 N. E. 2d 13 (1956); Braden v. Commonwealth, 291 S. W. 2d 843 (Ky., 1956).
[94] 18 U. S. C. §2385 (1952).
[95] 50 U. S. C. (1955 Supp.) §841.
[96] 350 U. S. 497, 500.
[97] 5 How. (U. S.) 410 (1847).
[98] 9 How. (U. S.) 559 (1850).
[99] In re Dixon, 41 Cal. 2d 756, 264 P. 2d 513 (1953); Natasi v. Aderhold, 201 Ga. 237, 39 S. E. 2d 403 (1946); People v. McDonnell, 80 Cal. 285 (1889) 22 Pac. 190; Ex parte Geisler, 50 Fed. 411 (C. C. Tex. 1883); In re Truman, 44 Mo. 181 (1869); State v. Moore, 6 Ind. 436 (1855); State v. Mix, 15 Mo. 153 (1851).

Prior to Fox v. Ohio, 5 How. (U. S.) 410 (1847), the state courts had uniformly reached the same conclusion in reliance on the savings clause appended to federal counterfeiting statutes. See e.g., Commonwealth v. Fuller, 49 Mass. 313 (1844); Chess v. State, 1 Blackf. (Ind.) 198 (1822); State v. Antonio, 3 Brev. (S. C.) 562 (1816).
[100] Cases cited note 42, supra. Cf. People v. Bartkus, 7 Ill. 2d 138, 130 N. E. 2d 187 (1955), aff'd by an equally divided court, 355 U. S. 281 (1958), set down for reargument, 356 U. S. 969 (1958), in which no preemption question was suggested.
[101] See Brooke v. State, 155 Ala. 78, 46 So. 491 (1908) (assault and battery in post office).
[102] Quinn v. State, 95 So. 2d 273 (Ala. App., 1957). For cases preceding the *Nelson* decision, see note 67, supra.
[103] Preemption arguments based on the *Nelson* case have been rejected in the following cases: Guerin v. State, 315 P. 2d 965 (Nev., 1957) (narcotics); People v. Knapp, 157 N. Y. S. 2d 820 (Gen. Sess. 1956) (labor extortion); People v. Bianchi, 3 N. Y. Misc. 2d 696, 155 N. Y. S. 2d 703 (Nassau Co. Ct., 1956) (excessive motorboat speed).
[104] 13 Ill. 2d 68, 147 N. E. 2d 327 (1958).
[105] Id. at 72 and 329.
[106] Ibid.
[107] Texas, Alabama, Louisiana, and Michigan. The statutes are described in Digest 383-402 (1955).
[108] Arkansas, Delaware and New Mexico.
[109] 52 Stat. 631 (1938), as amended, 22 U. S. C. §611 et seq. (1952).
[110] 18 U. S. C. §2386 (1952).
[111] California, Connecticut, Florida, Iowa, Louisiana, Maine, Montana, New Hampshire, New York and South Carolina. Alien registration statutes in Pennsylvania and Michigan have been invalidated. Hines v. Davidowitz, 312 U. S. 52 (1941) (Pennsylvania); Arrowsmith v. Voorhies, 55 F. 2d 310 (E. D. Mich. 1931) (Michigan).
[112] 312 U. S. 52 (1941).
[113] It should be noted that the Department of Justice, which opposed a finding of preemption with respect to state sedition statutes, has indicated that state communist control measures were governed by different considerations and were probably invalid. *Amicus curiae* brief for the United States at 38, n. 24, Pennsylvania v. Nelson, 350 U. S. 497 (1956).
[114] 345 Mich. 519, 77 N. W. 2d 104 (1956). Prior to the *Nelson* case, a divided three-judge federal district court had upheld the same statute. Albertson v. Millard, 106 F. Supp. 635 (E. D. Mich. 1952), vacated on other ground, 345 U. S. 242 (1953). See also Knox v. State, 38 Ala. App. 484, 87 So. 2d 672 (1956), where the question of the validity of Alabama registration provisions was not reached.
[115] See "Digest," op. cit. supra note 2, at 324-82, 410-34.
[116] State v. Diez, 97 So. 2d 105 (Fla., 1957). See also First Unitarian Church v. County of Los Angeles, 48 Cal. 2d 419, 441, 311 P. 2d 508, 522 (1957), rev'd on due process ground without reaching question of preemption, 357 U. S. 545 (1958) (denial of tax exemption to organization declining to file a declaration that it does not advocate forceful overthrow of government).
[117] Cf. Oklahoma v. United States Civil Service Comm'n, 330 U. S. 127 (1947).
[118] 18 U. S. C. §842 (1955 Supp.)
[119] 354 U. S. 234 (1957).
[120] State power to conduct legislative investigations of subversive activities has been sustained against a preemption argument in Kahn v. Wyman, 100 N. H. 245, 123 A. 2d 166 (1956), and Wyman v. Uphaus, 100 N. H. 436, 440, 130 A. 2d 278, 282 (1957). The petitioner in the *Sweezy* case made a preemption argument in the Supreme Court, but the Court was able to dispose of the case without reaching the question.
[121] U. S. Const., Art. I, §8, cls. 11-16; Art. I, §10, cl. 3.
[122] In People v. Lynch, 11 Johns. (N. Y.) 549 (1814), and in Ex parte Quarrier, 2 W. Va. 569 (1866), charges of treason were found improperly laid against a state, where the accused

was deemed to have acted rather against his allegiance to the United States. Professor Hurst in his study of Treason in the United States, 58 Harv. L. Rev. 226, 395, 806 (1945), states at p. 806 that "[t]he trials of Thomas Dorr, and of John Brown, for treason by levying war against the states of Rhode Island and Virginia, respectively, are the only completed treason prosecutions by state authorities."

[123] Mr. Justice Brandeis argued unsuccessfully in his dissenting opinion in Gilbert v. Minnesota, 254 U. S. 325, 334-43 (1920), that penalties for interference with federal recruitment were within the exclusive power of the federal government.

[124] 222 U. S. 424 (1912).

[125] E.g., Union Brokerage Co. v. Jensen, 322 U. S. 202 (1944) (state statute requiring license of foreign corporations held valid as applied to customhouse brokers licensed under a federal statute); Hines v. Davidowitz, 312 U. S. 52 (1941) (State alien registration statute requiring aliens to carry identification cards held superseded by federal registration statute not containing a similar provision); Savage v. Jones, 225 U. S. 501 (1912) (state statute requiring a more descriptive labelling of a product than was required by Federal Pure Food and Drug Act held valid).

[126] Cloverleaf Butter Co. v. Patterson, 315 U. S. 148 (1942) (a state inspection system of the *ingredients* used in making renovated butter, with power of condemnation, held superseded by a federal statute authorizing factory inspection and condemnation of unfit *products*); Kelly v. Washington ex rel. Foss Co., 302 U. S. 1 (1937) (state inspection law as applied to motor tugs which were not covered by federal inspection laws applicable to practically all other vessels held valid).

[127] California v. Zook, 336 U. S. 725 (1949).

[128] Mintz v. Baldwin, 289 U. S. 346 (1933); Asbell v. Kansas, 209 U. S. 251 (1908).

[129] Jerome v. United States, 318 U. S. 101 (1943).

[130] Pennsylvania v. Nelson, 350 U. S. 497 (1956), and Parker v. Brown, 317 U. S. 341 (1943), illustrate this tendency.

[131] California v. Zook, 336 U. S. 725 (1949); Hoke v. United States, 227 U. S. 308 (1913); Ex parte Siebold, 100 U. S. 371 (1879).

[132] Cases cited note 51, supra.

[133] See Meltzer, The Supreme Court, the Congress and State Jurisdiction Over Labor Relations, p. 95, infra.

[134] Among the more common "tests" are the following: (1) *The Conflict Test* " . . . in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. . . . " Sinnot v. Davenport, 22 How. (U. S.) 227, 243 (1859). (2) *The Coincidence Test*—"When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition. . . . " Charleston & W. C. Ry. Co. v. Varnville Furniture Co., 237 U. S. 597, 604 (1915). (3) *The Dominance Test*— " . . . the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice v. Santa Fe Elevator Corp., 331 U. S. 218, 230 (1947). (4) *The Pervasiveness Test*—"The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Rice v. Santa Fe Elevator Corp., supra. (5) *The Conflict in Administration Test*—" . . . enforcement of [the state law] presents a serious danger of conflict with the administration of the federal program." Pennsylvania v. Nelson, 350 U. S. 497, 505 (1956).

[135] The conflict test is often stated as the exclusive test when state regulation is upheld. E.g., Townsend v. Yeomans, 301 U. S. 441 (1937).

[136] E.g., Pennsylvania v. Nelson, 350 U. S. 497 (1956); Rice v. Santa Fe Elevator Corp., 331 U. S. 218 (1947).

[137] Powell, Supreme Court Decisions on the Commerce Clause and State Police Power, 1910-1914 II, 22 Col. L. Rev. 28, 48 (1922).

[138] 354 U. S. 234 (1957).

[139] 354 U. S. 178 (1957).

[140] See e.g., Aiuppa v. United States, 201 F. 2d 287 (C. A. 6th, 1952); United States v. Costello, 198 F. 2d 200 (C. A. 2d, 1952), cert. den., 344 U. S. 874 (1952).

[141] Bart v. United States, 349 U. S. 219 (1955); Emspak v. United States, 349 U. S. 190 (1955); Quinn v. United States, 349 U. S. 155 (1955).

[142] A witness claiming the privilege was originally required to show that his answers might disclose a material element of a crime. 8 Wigmore Evidence §§2260-61 (3d ed. 1940). This rule was ameliorated by Counselman v. Hitchcock, 142 U. S. 547 (1892), which held that a witness is privileged not to answer even a seemingly harmless question if the answer to that question would enable a prosecutor to discover incriminating evidence or otherwise tend to prove the commission of a crime. But until the last few years the witness was required to show that the apprehended danger was " 'real and appreciable . . . in the ordinary course of things' " and not so " 'improbable that no reasonable man would suffer it to influence his conduct.' " Mason v. United States, 244 U. S. 362, 365-66 (1917). The *Mason* case has been quietly laid to rest by Hoffman v. United States, 341 U. S. 479 (1951), and a series of *per curiam* reversals of lower federal court decisions which followed the *Mason* test. Trock v. United States, 351 U. S. 976 (1956); Singleton v. United States, 343 U. S. 944 (1952); Greenberg v. United States, 343 U. S. 918 (1952). Present law upholds the claim of the privilege if the witness can show any imaginable connection, not wholly incredible, between a possible answer to a question and a crime. The limits of human imagination being what they are, the result is that a witness willing to claim the privilege can rarely be compelled to answer.

See generally Note, The Privilege Against Self-Incrimination in the Federal Courts, 70 Harv. L. Rev. 1454, 1455-58 (1957).

[143] See text accompanying notes 231-50, infra.

[144] See United States v. Groves, 18 F. Supp. 3, 4 (W. D. Pa., 1937). Cf. Boyd v. United States, 116 U. S. 616, 634-35 (1886); FTC. v American Tobacco Co., 264 U. S. 298, 305-306 (1924).

[145] Consult Note, The Power of Congress to Investigate and to Compel Testimony, 70 Harv. L. Rev. 671, 673-674 (1957).

[146] See e.g., Barsky v. United States, 167 F. 2d 241, 254 (C. A. D. C., 1948) (dissenting opinion). Consult Comment, Legislative Inquiry Into Political Activity: First Amendment Immunity From Committee Interrogation, 65 Yale L. J. 1159 (1956).

[147] See e.g., Lawson v. United States, 176 F. 2d 49 (C. A. D. C., 1949), cert. den., 339 U. S. 934 (1950); Barsky v. United States, 167 F. 2d 241 (C. A. D. C., 1948), cert. den., 334 U. S. 843 (1948); United States v. Josephson, 165 F. 2d 82 (C. A. 2d, 1947), cert. den., 334 U. S. 843 (1948).

[148] Kilbourn v. Thompson, 103 U. S. 168, 194-195 (1881). But a proper legislative purpose is presumed if the matter under inquiry is one with respect to which Congress might validly legislate. McGrain v. Daugherty, 273 U. S. 135, 177-178

(1927); United States v. Orman, 207 F. 2d 148 (C. A. 3d, 1953).

[149] See e.g., United States v. Orman, 207 F. 2d 148 (C. A. 3, 1953); Rumely v. United States, 197 F. 2d 166 (C. A. D. C., 1952), aff'd, 345 U. S. 41 (1953); United States v. Kamin, 136 F. Supp. 791, 801-804 (D. Mass., 1956).

[150] See United States v. Orman, 207 F. 2d 148 (C. A. 3, 1953); Bowers v. United States, 202 F. 2d 447 (C. A. D. C., 1953); Marshall v. United States, 176 F. 2d 473 (C. A. D. C., 1949), cert. den., 339 U. S. 933 (1950).

[151] See e.g., United States v. Lamont, 236 F. 2d 312 (C. A. 2d, 1956) (indictment must allege authorization of legislative committee to conduct investigation in question); United States v. Kamin, 136 F. Supp. 791 (D. Mass., 1956) (narrow construction of congressional authorization).

[152] The contempt of Congress statute makes it a misdemeanor for any person "who having been summoned as a witness by the authority of either House of Congress . . . refuses to answer any question pertinent to the question under inquiry . . . . " Rev. Stat. §102 (1878); as amended, 2 U. S. C. §192 (1952).

[153] 354 U. S. 178 (1957). The *Watkins* case is discussed in the following articles and notes, among others: Fleischmann, Watkins v. United States and Congressional Power of Investigation, 9 Hast. L. J. 145 ((1958); Note, The Supreme Court, 1956 Term, 71 Harv. L. Rev. 141-146 (1957); Comment, Congress v. The Courts: Limitations on Congressional Investigation, 24 U. of Chi. L. Rev. 740 (1957); Note, 56 Mich. L. Rev. 272 (1957).

[154] Watkins said: " . . . I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. . . ." 354 U. S. 178, 185.

[155] Watkins v. United States, 233 F. 2d 681 (C. A. D. C., 1956).

[156] 354 U. S. 178 (1957). The Chief Justice wrote for the majority of six. Mr. Justice Frankfurter joined the opinion of the Court, but also filed a supplemental concurring opinion stressing the narrow grounds of decision. Mr. Justice Clark was the lone dissenter, and Justices Burton and Whittaker did not participate.

[157] 354 U. S. 178, 216-217 (concurring opinion).

[158] H. R. Res. No. 5, 83rd Cong., 1st Sess., 99 Cong. Rec. 15, 18, (1953).

[159] I am satisfied from a reading of the record that Watkins was not laboring under any misapprehension concerning the nature of the inquiry—it was part of a continuing investigation of Communist infiltration of important labor unions. See the dissenting opinion of Mr. Justice Clark, 354 U. S. 178, 225-227.

[160] The Court's emphasis on the use of the statutory contempt procedure raises the question whether Congress could circumvent the holding by returning to the older practice of direct contempt of Congress. A person committed by action of Congress itself can test the legality of his detention in a habeas corpus proceeding. Kilbourn v. Thompson, 103 U. S. 168 (1881). And pertinency of the questions to a valid legislative inquiry would appear to be a constitutional issue open on habeas corpus. Any attempt by Congress to overrule the *Watkins* case is likely to raise serious constitutional questions.

[161] See United States v. Harriss, 347 U. S. 612 (1954); United States v. Cardiff, 344 U. S. 174 (1952); Winters v. New York, 333 U. S. 507 (1948); Musser v. Utah, 333 U. S. 95 (1948); Lanzetta v. New Jersey, 306 U. S. 451 (1939).

[162] 354 U. S. 178, 200-206.

[163] Id. at 200.

[164] 103 U. S. 168 (1881).

[165] In United States v. Rumely, 345 U. S. 41, 46 (1953), the Court spoke of "the loose language of *Kilbourne* v. *Thompson*" and "the inroads that have been made upon that case by later cases." See also, McGrain v. Daugherty, 273 U. S. 135, 177-80 (1927); United States v. Orman, 207 F. 2d 148 (C. A. 3d, 1953).

[166] 354 U. S. 178, 200.

[167] Id. at 197. Under this view the "law" abridging speech is the prospective legislation which the investigation may precede. It would seem more plausible to regard the congressional resolution as a "law" for the purposes of the first amendment.

[168] 354 U. S. 178, 197.

[169] Id. at 205.

[170] Consult Driver, Constitutional Limitations on the Power of Congress To Punish Contempts of Its Investigating Committees, 38 Va. L. Rev. 887, 1011 (1952); Note, The Power of Congress To Investigate and To Compel Testimony, 70 Harv. L. Rev. 671 (1957); Note, Constitutional Limitations on the Un-American Activities Committee, 47 Colum. L. Rev. 416 (1947).

[171] The following state cases deal with legislative power to compel testimony: State v. Morgan, 167 Ohio St. 295, 147 N. E. 2d 847 (1958); Wyman v. Uphaus, 100 N. H. 436, 130 A. 2d 278 (1957), aff'd after reargument, 101 N. H. 139, 136 A. 2d 221 (1957); Kahn v. Wyman, 100 N. H. 245, 123 A. 2d 166 (1956); Opinion of the Justices, 331 Mass. 764, 119 N. E. 2d 385 (1954); Daniman v. Board of Education of New York, 306 N. Y. 532, 119 N. E. 2d 373 (1954); Matson v. Jackson, 368 Pa. 283, 83 A. 2d 134 (1951); Fawick Airflex Co. v. United Electrical Workers, Local 735, 56 Ohio Abst. 419, 92 N. E. 2d 431 (Ct. of App. Cuyahoga, 1950), appeal diss'd, 154 Ohio St. 206, 93 N. E. 2d 480 (1950); State ex rel. Benemovsky v. Sullivan, 37 So. 2d 907 (Fla., 1948); State v. James, 36 Wash. 2d 882, 221 P. 2d 482 (1950), cert. den., 341 U. S. 911 (1950); State ex rel. Robinson v. Fluent, 30 Wash. 2d 194, 191 P. 2d 241 (1948), cert. den., 335 U. S. 844 (1948); Ex parte Coon, 44 Cal. App. 2d 531, 112 P. 2d 767 (1941); In re Joint Legislative Committee, 285 N. Y. 1, 32 N. E. 2d 769 (1941); Smith v. Kern, 285 N. Y. 632, 33 N. E. 2d 556 (1941); In re Martens, 109 Misc. 492, 180 N. Y. S. 171 (Sup. Ct. 1919).

[172] Cantwell v. Connecticut, 310 U. S. 296 (1940); Gitlow v. New York, 268 U. S. 652 (1925).

[173] See Rochin v. California, 338 U. S. 49 (1949); Adamson v. California, 332 U. S. 46 (1947).

[174] A recent illustration of this is Knapp v. Schweitzer, 357 U. S. 371 (1958). Knapp was convicted of contempt in a state court when he refused to testify after being granted immunity from state prosecution. He argued that his answers might tend to incriminate him under federal law. The Supreme Court affirmed the conviction, holding that it was not a denial of due process for the state to compel Knapp, over his objection, to testify as to matters which might incriminate him under federal law, at least where there was no showing that federal officers had induced or participated in the testimonial compulsion. This conclusion follows logically from the prior authorities. Indeed, the three dissenting justices did not quarrel with the conclusion but only with the disposition— they felt that the state court had decided the case under a misapprehension of fed-

eral law and that it should be remanded to it for reconsideration in the light of a correct interpretation of federal law. The problem involved in the *Knapp* case appears to have been created by Feidman v. United States, 322 U. S. 487 (1944), in which the Court held, 4-3, that evidence obtained by state authorities under testimonial compulsion was admissible in a federal criminal prosecution. Four members of the present Court have now asked for a reconsideration of the *Feldman* case. See 357 U. S. 371, 381-385. See also State v. Morgan, 167 Ohio St. 295, 147 N.E. 2d 847 (1958) reaff'g, 164 Ohio St. 529, 133 N.E. 2d 104 (1956); Wyman v. DeGregory, 100 N.H. 163, 121 A. 2d 805.

[175] 354 U. S. 234 (1957).

[176] N.H. Rev. Stat. Ann. §588.1-16 (1955).

[177] N.H. Laws 1953, c. 307. See Nelson v. Wyman, 99 N.H. 33, 105 A. 2d 756 (1954).

[178] No question with respect to a state's power to investigate activities at a state-supported university was presented, since the New Hampshire Supreme Court had held that this purpose was not within the authority conferred on the attorney general. Hence the questions relating to the lecture could only be upheld as they related to Sweezy as a possible "subversive person."

[179] Wyman v. Sweezy, 100 N.H. 103, 121 A. 2d 783 (1956).

[180] 354 U.S. 234 (1957). Mr. Justice Frankfurter, with whom Mr. Justice Harlan joined, concurred in the result, but on another ground. Mr. Justice Clark dissented in an opinion which Mr. Justice Burton joined. Mr. Justice Whittaker did not participate.

[181] Id. at 247.

[182] Id. at 249-52.

[183] Id. at 253 (emphasis added).

[184] See, e.g., Dreyer v. Illinois, 187 U. S. 71, 84 (1902). But cf. Tenney v. Brandhove, 341 U. S. 367, 378 (1951) (dictum).

[185] 354 U. S. 234, 260-67.

[186] Id. at 270.

[187] Id. at 255.

[188] E.g., Brewster v. United States, 255 F. 2d 899 (C.A. D.C., 1958) (authorization of Senate Committee on Government Operations not sufficiently clear to compel labor union official to testify concerning misuse of union funds).

[189] The crucial question left unsettled is whether vagueness or breadth of an authorizing resolution is itself bad. If so, *Watkins* will have a considerable impact on the organization of investigating committees. Standing committees with broad authorizations and settled jurisdiction might be precluded from conducting investigations requiring use of the subpoena power. This would force Congress to create *ad hoc* committees for the purpose of conducting particular investigations.

A bare majority of the Court of Appeals for the District of Columbia Circuit, sitting *en banc*, in a series of cases remanded to it for reconsideration in the light of *Watkins* has adopted the position that a clarification at the hearing by the committee chairman of the nature and scope of the inquiry satisfies the due process requirements laid down in *Watkins*. Barenblatt v. United States, 240 F. 2d 875 (C.A. D.C., 1957), judgment vacated and case remanded for reconsideration, 354 U. S. 930 (1957), affirmed after reconsideration, 252 F. 2d 129 (1958), cert. granted, 356 U. S. 929 (1958) (No. 35, October Term, 1958); Flaxer v. United States, 235 F. 2d 821 (C.A. D.C., 1956), judgment vacated and case remanded for reconsideration, 354 U. S. 929 (1957), affirmed after reconsideration, 258 F. 2d 413 (1958), cert. granted, 357 U. S. 904 (1958) (No. 60, October Term, 1958). It would seem that the Court of Appeals gave a correct interpretation to the *Watkins* decision. In any event, the issue is back in the hands of the Court. It may not be reached in either case, however, because of the presence of other questions which may prove decisive.

[190] See the discussion of the effect of the *Nelson* case on legislative investigations, supra at notes 119-20.

[191] 354 U. S. 234, 251.

[192] Uphaus v. Wyman, 100 N.H. 440, 130 A. 2d 278 (1957), judgment vacated and remanded for reconsideration, 355 U. S. 16 (1957), reaffirmed after reargument, 101 N.H. 139, 136 A. 2d 221 (1957), prob. juris. noted, 356 U. S. 926 (1958).

Uphaus, the director of a New Hampshire resort center, refused to produce guest registrations and correspondence relating to speakers and discussion leaders. He was convicted of contempt under the same New Hampshire statutes involved in the *Sweezy* case. New Hampshire having given affirmative indications that it wants the information, the first amendment question will be difficult to escape.

[193] A thorough and excellent treatment of the entire subject is Brown, Loyalty and Security (1958).

[194] Hawker v. New York, 129 U. S. 114 (1898); Dent v. West Virginia, 129 U. S. 114 (1889).

[195] Douglas v. Noble, 261 U. S. 165 (1923); Dent v. West Virginia, 129 U. S. 114 (1889); Cummings v. Missouri, 4 Wall. (U. S.) 277, 319-320 (1867).

[196] Cf. Yick Wo v. Hopkins, 118 U. S. 356 (1886).

[197] 341 U. S. 716 (1951).

[198] Id. at 719.

[199] Garner v. Board of Public Works, 98 Cal. App. 2d 493, 220 P. 2d 958 (Dist. Ct. App. 1950).

[200] 341 U. S. 716 (1951).

[201] Only Justices Black and Douglas dissented with respect to the affidavit. They thought the case in all its aspects was controlled by Cummings v. Missouri, 4 Wall. (U. S.) 277 (1867), and Ex parte Garland, 4 Wall. (U. S.) 333 (1867), in which test oaths directed against adherents of the confederate cause were struck down as bills of attainder and ex post facto laws.

[202] 341 U. S. 716, 725 (concurring opinion).

[203] Id. at 720, 730.

[204] In addition to Justices Black and Douglas, Justices Frankfurter and Burton dissented to this portion of the case.

[205] Id. at 722.

[206] Id. at 725 (concurring opinion).

[207] 341 U. S. 56 (1951).

[208] 342 U. S. 485 (1952).

[209] Persons employed or seeking employment in the public schools "have no right to work for the State in the school system on their own terms . . . They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." Id. at 492.

Cf. Schware v. Board of Bar Examiners, 353 U. S. 232, 238-239 (1957); Wieman v. Updegraff, 344 U. S. 183, 191-192 (1952).

[210] Adler v. Board of Education, 342 U. S. 485, 494 (1952); Garner v. Board of Public Works, 341 U. S. 716, 723-724 (1951); Gerende v. Board of Supervisors, 341 U. S. 56-57 (1951).

[211] 344 U. S. 183 (1952).

[212] Id. at 191.

[213] Sweezy v. New Hampshire, 354 U. S. 234 (1957).

[214] 353 U. S. 232 (1957).

[215] Cf., e.g., Adams v. Tanner, 244 U. S. 590 (1917) (invalidating state law absolutely prohibiting private employment agencies), with Brazee v. Michigan, 241 U. S. 340 (1916) (upholding state law imposing license fees on private employ-

ment agencies and prohibiting them from sending applicants to an employer who had not applied for labor).

[216] Allgeyer v. Louisiana, 165 U. S. 578, 589 (1897).

[217] Hawker v. New York, 170 U. S. 189 (1898) (upholding, 6-3, a state law excluding persons convicted of a felony from the practice of medicine); Dent v. West Virginia, 129 U. S. 114 (1889) (upholding a state law restricting the practice of medicine to those satisfying state board of their qualifications).

[218] See, e.g., Williamson v. Lee Optical Co. of Oklahoma, 348 U. S. 483 (1955). In upholding an Oklahoma statute which (1) made it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to the face or to duplicate or replace lenses, except upon the written prescription of an Oklahoma-licensed optometrist or ophthamologist; (2) subjected opticians to this regulatory system while exempting all sellers of ready-to-wear glasses; (3) forbad the use of the premises of retail stores by opticians; and (4) prohibited all advertising, the Court said: "The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature not the courts, to balance the advantages and disadvantages of the new requirement . . . . The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." 348 U. S. 483, 487-88.

[219] E.g., Hardware Dealers Mutual Fire Ins. Co. v. Glidden, 284 U. S. 151, 158-59 (1931): Since the legislation "deals with a subject within the scope of the legislative power, the presumption of constitutionality is to be indulged . . . . We cannot assume that the Minnesota legislature did not have knowledge of conditions supporting its judgment that the legislation was in the public interest, and it is enough that, when the statute is read in the light of circumstances generally known to attend the recovery of fire insurance losses, the possibility of a rational basis for the legislative judgment is not excluded."

[220] E.g., Kotch v. Pilot Commissioners, 330 U. S. 552 (1947) (upholding, 5-4, a Louisiana river pilotage law under which incumbent pilots had an unfettered discretion to select their successors, a discretion actually exercised by choosing friends and relatives of the pilots); Daniel v. Family Security Life Ins. Co., 336 U. S. 220 (1949) (upholding a state statute forbidding life insurance companies and their agents from operating an undertaking business and forbidding undertakers from serving as life insurance agents; only one insurance company in the state operated on the basis of using undertakers as its agents).

[221] 353 U. S. 232 (1957).

[222] 60 N.M. 304, 291 P. 2d 607 (1955).

[223] 353 U. S. 232. Mr. Justice Whittaker did not participate.

[224] Wieman v. Updegraff, 344 U. S. 183 (1952).

[225] See, generally, Gellhorn, Individual Freedom and Governmental Restraints, C. 3 (1956).

[226] See, e.g., Norris v. Alabama, 294 U. S. 587 (1935); Chambers v. Florida, 309 U. S. 227 (1940); Ashcraft v. Tennessee, 322 U. S. 143 (1944); Haley v. Ohio, 332 U. S. 596 (1948); Watts v. Indiana, 338 U. S. 49, 50-54 (1949); Turner v. Pennsylvania, 338 U. S. 62 (1949); Fikes v. Alabama, 352 U. S. 191 (1957); Payne v. Arkansas, 356 U. S. 560 (1958). Cf. Stein v. New York, 346 U. S. 156, 181 (1953); Lisenba v. California, 314 U. S. 219 (1941). Consult Berman, Supreme Court Review of State Court "Findings of Fact" in Certain Criminal Cases, 23 So. Calif. L. Rev. 334 (1950).

[227] See, e.g., Stein v. New York, 346 U. S. 156, 181 (1953); Brown v. Allen, 344 U. S. 443 (1953).

[228] 353 U. S. 232, 250, quoting 60 N.M. 304, 319, 339, 291 P. 2d 607, 617, 630.

[229] Id. at 251.

[230] Id. at 248.

[231] Gellhorn, The States and Subversion, 367-368 (1952); Byse, A Report on the Pennsylvania Loyalty Act, 101 U. of Pa. L. Rev. 480 n. 5 (1953); Brown, Loyalty and Security, C. 6 (1958).

[232] Speiser v. Randall, 357 U. S. 513 (1958), and First Unitarian Church v. County of Los Angeles, 357 U. S. 545 (1958), take this approach to a limited degree. California grants real estate tax exemptions to veterans and churches, among others. But the exemption is conditioned upon the taxpayer taking an oath that he does not advocate the overthrow of government by unlawful means. California, after contruing the oath as extending only to those whose advocacy constitutes a criminal offense under state or federal law, upheld the denial of tax exemptions to various veterans and churches which refused to take the oath. Although the taxpayers had based their refusal to answer upon first amendment grounds, the Court, in reversing, held that the procedure violated the due process clause in that the oath did not conclusively establish the absence of improper advocacy, but merely imposed upon the taxpayers rather than the state the burden of proving non-advocacy. Placing the burden on the taxpayers was improper since an adverse determination would amount to a penalty for the exercise of speech.

Mr. Chief Justice Warren did not participate; Mr. Justice Burton concurred in the result; Justices Black and Douglas wrote concurring opinions dealing directly with the first amendment issue; and Mr. Justice Clark, the lone dissenter, objected to the construction given to the state statute by the majority, disagreed with its conclusion that the burden of proof could not be placed on the taxpayers, and argued that in any event such a position should not be taken in a case where the taxpayers had refused to take the oath.

[233] Sweezy v. New Hampshire, 354 U. S. 234 (1957). See text accompanying notes 175-87, supra.

[234] See text accompanying note 211 et seq., supra.

[235] In re Anastaplo, 3 Ill. 2d 471, 121 N.E. 2d 826 (1954), appeal dismissed and cert. denied, 348 U. S. 946 (1954); In re Summers, 325 U. S. 561 (1945).

The *Anastaplo* case, seemingly a clear case of a refusal to cooperate on grounds of conscience, is discussed in London, Heresy and the Illinois Bar, 12 Law. Guild Rev. 163 (1952); Note, The Illinois Bar and Individual Freedom, 50 Nw. L. Rev. 94 (1955).

The *Summers* case involved a bar applicant who held pacifist views concerning the use of force. The Supreme Court affirmed, 5-4, an Illinois decision denying his admission on the sole ground that his religious views prevented him from swearing in good faith to uphold the Constitution of Illinois, which contained a provision requiring service in the state militia in time of war. The overruling of United States v. Macintosh, 283 U. S. 605 (1931), and United States v. Schwimmer, 279 U. S. 644 (1929), both of which were relied on in *Summers*, by Girouard v. United States, 328 U. S. 61 (1946), undermined the authority of the *Summers* case.

[236] 350 U. S. 551 (1956).

[237] The dissenting justices, Justices Reed, Burton, Minton, and Harlan, disputed this interpretation of the New York City charter. Uncertainties with respect to the content and meaning of state law have been present in most of the cases here discussed. The Court has sometimes given great deference to the exposition of state law by the state courts *(Beilan; Lerner);*

on other occasions it has been willing to construe state statutes on matters not yet passed upon by state courts *(Garner; Adler);* and on still other occasions it has rejected interpretations of unclear state law which would sustain constitutionality *(Konigsberg; Speiser).* There has been no notable tendency to remand cases to the state courts for a clarification of uncertain state law.

[238] 350 U. S. 551, 558-59.

[239] 353 U. S. 252 (1957). Mr. Justice Whittaker did not participate.

[240] Id. at 254.

[241] Id. at 276-312.

[242] See the discussion of the *Beilan* and *Lerner* cases, infra.

[243] ". . . Obviously the State could not draw unfavorable inferences as to his truthfulness, candor or his moral character in general if his refusal to answer was based on a belief that the United States Constitution prohibited the type of inquiries which the Committee was making. On the record before us, it is our judgment that the inferences of bad moral character which the Committee attempted to draw from Konigsberg's refusal to answer questions about his political affiliations and opinions are unwarranted." Id. at 270-71.

[244] Schware v. Board of Bar Examiners, 353 U. S. 232 (1957).

[245] 357 U. S. 399 (1958).

[246] It is significant that the three dissenters in *Konigsberg* were in the majority in *Beilan,* along with Mr. Justice Burton (who was also in the majority in *Konigsberg*) and Mr. Justice Whittaker (who did not participate in *Konigsberg*). The four dissenting justices in *Beilan* were all in the majority in *Konigsberg.* Since it is likely that Justices Black and Douglas, and perhaps the Chief Justice and Mr. Justice Brennan as well, would have preferred to take a more extreme position in *Konigsberg,* holding that questions concerning political affiliation and belief are barred by the first amendment or are irrelevant to fitness, it seems safe to assume that the more moderate position was taken only to gain a majority for reversal. Since Mr. Justice Burton was the only member of the Court who was in the majority in both cases, and his vote was essential to each, it is possible that the cases represent his views. If so, his retirement and the appointment of Mr. Justice Stewart may reopen the entire matter.

[247] 357 U. S. 399, 409.

[248] 357 U. S. 468 (1958).

[249] Beilan, like Slochower, had invoked the fifth amendment privilege before a congressional committee, but unlike Slochower, Beilan was purportedly dismissed for failing to answer questions of a superior. Mr. Chief Justice Warren in his dissenting opinion in *Beilan* argued that from a realistic standpoint the case was indistinguishable from *Slochower,* since Beilan's dismissal took place only five days after he had claimed the privilege before a congressional committee while his refusal to answer his superiors occurred some thirteen months before.

The significant factual differences between *Lerner* and *Beilan* are (1) that the former, but not the latter, relied on fifth amendment grounds in refusing to answer his superiors; and (2) that Lerner was dismissed as a "security risk" while Beilan was dismissed for "incompetency."

[250] The Chief Justice and Justices Black, Douglas, and Brennan dissented in three separate opinions. Mr. Justice Brennan's dissent argued that Pennsylvania in *Beilan* and New York in *Lerner* had publicly labeled the respective petitioners as disloyal Americans and that, if they were to be discharged under security statutes, it should be through a procedure which avoided this stigma. Factually, this argument seems stronger in *Lerner* than in *Beilan.* Mr. Justice Frankfurter's separate concurrence in both cases appears to be a reply to this argument.

[251] Adler v. Board of Education, 342 U. S. 485 (1952); Garner v. Board of Public Works, 341 U. S. 716 (1951); Gerende v. Board of Supervisors, 341 U. S. 56 (1951).

[252] Wieman v. Updegraff, 344 U. S. 183 (1952).

[253] Schware v. Board of Bar Examiners, 353 U. S. 232 (1957); Konigsberg v. State Bar of California, 353 U. S. 252 (1957).

[254] See opinion of Mr. Justice Burton in Garner v. Board of Public Works, 341 U. S. 716, 729 (1951) (concurring in part and dissenting in part).

Congress, The States and Commerce

By ALLISON DUNHAM
Professor of Law,
The University of Chicago Law School

[*This article will be printed in the Spring issue of the* Journal of Public Law, *Spring 1959.*]

In the 1870's the National Grange with a membership of over one and one-half million persons interested in agriculture sought to defend its members and the public against greatly feared power of monopolies, particularly against excessive rates exacted by railroads and grain elevators.[1] Its political power was so extensive that it induced a number of state legislatures to enact statutes limiting the rates to be charged by these businesses. It was almost unbelievable in the economic climate of the time that government could regulate the price at which private property or its services were sold. In 1876 operators of grain elevators in the Chicago area challenged the Illinois statute. They claimed that the statutes constituted a deprivation of private property without due process of law. Secondarily they asserted that the commerce clause gave exclusive regulation to Congress. In a series of cases sometimes known as the *Granger Cases* and sometimes by the name of the spearhead case, *Munn v. Illinois*,[2] the Supreme Court upheld the validity of the Illinois statute.[3] Chief Justice Waite wrote for the majority and concentrated on the due process argument. This case has been said to belong among the dozen or so most important cases in our constitutional history.[4] It gave constitutional warrant to economic regulation of private property and opened new vistas to legislative majorities. Although a misuse of Waite's inept expression "business clothed with a public interest" was for a time turned to restrict rather than permit regulation of business enterprise, the main doctrine of that case is firmly established in the constitutional law of state and nation.[5]

Seventy years later, in 1947, this same Illinois statute regulating rates of grain elevators was again in the United States Supreme Court. The elevator operators again were objecting to the Illinois statute but they did not claim to be free of regulation; nor did they claim as they did in 1876 that the dormant Commerce clause excluded State regulation. They claimed that the United States Warehouse Act[6] which admittedly regulated them in some respects had superseded the authority of the Illinois Commerce Commission to regulate the commercial matters in question. The Supreme Court of the United States, speaking through Mr. Justice Douglas, upheld this contention and affirmed a decree enjoining a proceeding before the Illinois Commission under this venerable and famous statute. *Rice v. Santa Fe Elevator Corporation*[7] thus buried the first major statutory regulation of private industry in the United States. This remarkable sequence aptly makes the point of the major area of constitutional controversy outside of the personal liberty field. Today we seldom ask, *can* government regulate; we ask a little more often, *can* a state government regulate interstate commerce; we ask almost every day, *has* federal legislation superseded state legislation in any particular field.

The legislative and administrative history of the United States Warehouse Act is also indicative of the developing problem and it indicates that current constitutional controversy is also ancient controversy. The first United States regulation of warehouses came in 1916 as a part of a rash of regulations of the Wilsonian era. That act carefully provided that it should in no way be construed to conflict with or limit state acts.[8] In 1931 the Secretary of Agriculture asked Congress to amend the act so that the federal act should be "exclusive" with respect to all persons securing a federal license.[9] Presumably in 1931 no one knew what this really meant or that it meant anything more than the supremacy of the federal act wherever there was a direct conflict with a state act.[10] But after 1940 this older statute was challenged as one among many state statutes alleged to have been displaced by federal law.

This summary history of warehouse legislation contains the elements of my subject—the power of the states to regulate economic activity of persons where the transaction touches more than one state. A dispute which starts as a question whether any government may regulate private property in *Munn v. Illinois* must of necessity become a question, once an affirmative answer has been given, which government may regulate. The answer to the question of which government may regulate is controlled or shaped by the entire constitutional history of this country. To understand this we should recall that the Constitution neither refers to "interstate commerce" nor does it prohibit the states from doing anything with respect to "commerce" (a term which is used) except laying imposts or duties on imports or exports.[11] All that the Commerce Clause says is that Congress has the power "To regulate Commerce with foreign nations, and among the several states and with the Indian tribes."[12]

As an original proposition concerning this clause it could be argued as my colleague Professor Crosskey argues in his monumental history of the constitutional convention and times,[13] that this clause gave to Congress complete power over regulations of commerce, whether inter- or intra-state. It could likewise be argued as Chief Justice Taney urged in his opinion in the *License Cases* in 1847 that

> "the mere grant of power to the general government cannot . . . be construed to be an absolute prohibition on the exercise of any power over the same subject by the States . . . (I)n my judgment, the State may . . . make regulations of commerce . . . unless they come in conflict with a law of Congress."[14]

Neither Professor Crosskey's theory nor Chief Justice Taney's has ever been successfully urged in the Supreme Court, although they have been asserted from time to time since *Cooley v. Board of Wardens*[15] established a different or third proposition. All modern cases say something similar to Chief Justice Stone's statement in *Southern Pacific Co. v. Arizona* in 1945:

> "Ever since . . . Cooley v. Board of Wardens, 12 How. 299 it has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent regulate it . . . But ever since Gibbons v. Ogden, 9 Wheat. 1, the states have not been deemed to have authority to impede substantially the free flow of commerce from state to state, or to regulate those phases of the national commerce which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority."[16]

Chief Justice Stone continued:

> "For a hundred years it has been accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court and not the state legislature is under the commerce clause, the final arbiter between competing demands of state and national interests. . . ."[17]

Mr. Justice Black has from time to time attempted to revive the Taney view that there is no negative implication from the commerce clause[18] but it would appear that since *Morgan v. Virginia*[19] in 1946 where the court held unconstitutional under the commerce clause the Virginia statute requiring separation of passengers on a color basis, he has acquiesced in the Court's phrasing of the power of the states over interstate commerce. The late Mr. Justice Jackson tried in *Hood and Sons v. DuMond*[20] to revive an idea from the Marshall era that the commerce clause of its own effect prohibited regulation of certain subjects concerning commerce by the states. He also was unsuccessful. Thus we may say as the court says almost every term: "The commerce clause of its own force inhibits to some extent the power of the states" and we may further say that it is the Supreme Court not the state legislature which determines the extent of this inhibition.

To say that the states are to some extent inhibited by the commerce clause from regulating or even to say that federal legislation sometimes displaces state legislation does not tell us how much nor does it give us a real picture of the impact of Supreme Court decisions on our federal system. Historically (and I think correctly) critical appraisal of the court's work has assumed that the doctrine of federalism does not permit a quick and easy conclusion that state power was inhibited by the constitution or restricted by the passage of an act by the national legislature. Thus it was that critics of the Supreme Court before 1940 thought that the Court was unduly restricting state power under a theory that congressional power under the Commerce Clause was exclusive.

In this time when it is easy to criticize the Supreme Court for weakening the states, it is pleasant to report that as far as the dormant commerce clause is concerned the Supreme Court since the late 1940's has considerably enhanced the power of the states to regulate economic activity which touches more than one state. As far as the commerce clause is concerned "to some extent" in the quoted phrase means "very little."

But if the doctrine of federalism requires us to believe that a heavy burden of persuasion should be on him who asserts that an act of Congress displaces state exercised power, then we must assert that since 1940 the Supreme Court and Congress between them have drastically reduced a state's ability to deal with its own social order and economic enterprise as it wishes. The Congressional contribution to the consequent decline of federalism has been the expansion of the exercise of federal power. The Court's contribution has been to find from vague inferences concerning the exercise of federal power that Congress intended to displace state law by such legislation.

Two matters will be described in this monograph: (1) the factors which the Supreme Court appears to consider in arbitrating the competing demands of state and national interests under the Commerce Clause when Congress has not acted; and (2) the factors which the Court appears to consider in determining

whether congressional regulation of a matter precludes state regulation of a related matter or field. State taxation of interstate commerce[21] and federal and state regulation of labor will not be considered.

At first thought it might appear incongruous to combine in one paper a consideration of the factors which determine the constitutionality of a state statute under the commerce clause with a consideration of factors which govern the construction of an act of Congress.[21a] One justification for this combination of subjects comes from the fact that whether it be the negative implication of the dormant Commerce Clause which voids a state statute or it be a conclusion that Congressional statutes have occupied the field, the decision of the Supreme Court is subject to the control of Congress. As the Supreme Court has said on numerous occasions and held several times "Congress has undoubted power to redefine the distribution of power over interstate commerce."[22] Congress may either permit the states to regulate the commerce in a manner which would otherwise not be permissible under Court decisions or it may exclude state regulation even of matters of local concern if it believes interstate commerce is affected. Thus it may be said that whether the Court is arbitrating between state and federal power under the Commerce Clause or whether it is construing a federal statute to determine whether Congress intended that state law be superseded, the problem is basically the same. In the former case the question before the court is the significance to be attached to Congressional silence or failure to act; in the latter case the question before the court is the significance to be attached to the fact that Congressional legislation regulated only a limited amount of that which could have been regulated. In both cases the Court must decide for itself, without much help from Congress whether an industry or activity should be left in some respect unregulated. In *California v. Zook*, in 1949 the Court equated the two problems thus: "Whether Congress has or has not expressed itself, the fundamental inquiry is the same: does the state action conflict with national policy."[23]

While attempts have been made from time to time to work with mechanistic formulae and thus to avoid making a judgment, it is now clear that in this area at least a court cannot avoid judging. The attempt to determine whether a state act is a regulation of commerce and therefore void or is an exercise of the police power and therefore good;[24] the attempt to determine when interstate commerce ends, for example after the original package is broken[25] or when interstate commerce begins, for example after natural gas is pressurized for transmission in pipes;[26] the attempt to determine whether a burden on interstate transactions is direct and therefore bad or indirect and therefore good[27] have each ended in failure. As Justice Stone said in his dissent in the *DiSanto* case over 30 years ago the judges who make this attempt "are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."[28] Something more substantial is needed and courts should avoid searching for the unobtainable in this field. There is no substitute for hard analysis, mustering of facts and ultimately, the making of judgments hard to make.

Although not fool proof in predictability the judicial method used and suggested in *Southern Pacific Co. v. Arizona*[29] decided in 1944 offers real suggestions for courts struggling with this difficult problem. The facts of the case were these: In 1912 Arizona made it unlawful to operate within the state a railroad train of more than 14 passengers or 80 freight cars. In 1941 the state brought suit against the Southern Pacific Company to recover the statutory penalties for violation of the statute. The Supreme Court of Arizona upheld the act as a safety measure designed to reduce the number of accidents. The Supreme Court speaking through Chief Justice Stone reversed. In this opinion he outlined various steps in analysis leading to exercise of judgment.

First he required that any asserted violation of the Commerce Clause be supported by relevant factual material which "will afford a sure basis" for an informed judgment. This is another way of putting the usual presumption of constitutionality but the similarity with the presumption rule ends at this point for as the Chief Justice said:

> "in considering the effect of the statute as a safety measure, therefore, the factor of controlling significance for present purposes *is not whether there is basis for the conclusion of the Arizona Supreme Court* that the increase in length of trains beyond the statutory maximum has an adverse effect upon safety of operation. The decisive question is whether in the circumstances the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject to local regulation which does not have a uniform effect. . . ."[30] (italics supplied)

Where did the Supreme Court get the idea that this was a safety measure? Chief Justice Stone said that while he accepted the Arizona conclusion in this case that there was a need for safety and that the measure served this purpose, this conclusion is not binding on the Supreme Court. In other words the legislative recital that this is a safety measure does not bind the Supreme Court in Commerce Clause cases; the court

must analyze the statute and its effect to determine this for itself. *Hale v. Bimco Trading Co.*,[31] decided in 1939, is illustrative of this part of the Court's function. A Florida statute recited that the poor quality of foreign cement jeopardized public safety and that therefore inspection of the quality of such cement was required and a substantial fee was charged for the inspection. The recital in the statute seemed to bring it within the traditional subject matter of local regulation. But the Supreme Court did not stop with the recital. It noticed that the statute by its terms was applicable only to imported cement. Justice Frankfurter pointed out that if public safety was the real objective of this inspection fee that objective demanded equal application of the quality and inspection requirements to all cement used in construction in Florida. From this analysis the court concluded that this law was really a restraint on competition and therefore an invalid discrimination against foreign commerce.

The Court's statement in *Southern Pacific* that it was accepting the regulation as a safety measure and the Court's analysis in *Hale* to conclude that this was a measure regulating competition indicate another factor of significance. It would appear from the decided cases that the extent of the permissible burden on interstate commerce varies with the objective of the state statute. There may be some objectives which are not permissible whatever the effect on commerce. Mr. Justice Jackson attempted to carve out such an area in *H. P. Hood and Sons v. DuMond*[32] in 1949. Petitioner was a milk distributor in Massachusetts who operated three licensed receiving stations in New York. It applied for license for an additional receiving station but the New York authorities denied the application on the ground that expansion of facilities would reduce the supply of milk for local markets and would result in destructive competition. Speaking for a majority of five Justice Jackson held the refusal to license petitioner an unconstitutional burden on interstate commerce. He said:

> "This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage is one deeply rooted in both our history and our law."[33]

If Justice Jackson meant to establish an absolute principle concerning economic regulation, the cases before and after the Hood case do not support it. A producing state has been given considerable leeway in fixing prices to be paid producers even when the bulk of the product is sold in interstate commerce and even when the purpose of the regulation is to improve the economic well-being of the producers at the expense of out-of-state consumers. Thus in *Milk Control Board v. Eisenberg*[34] sustaining an order fixing the price to be paid milk producers by a dealer selling the product out of the state, *Parker v. Brown*[35] sustaining an elaborate scheme to control the supply of raisins sold primarily to out of state consumers; and *Cities Service Co. v. Peerless Co.*,[36] sustaining an order of the Oklahoma Corporation Commission fixing a minimum wellhead price, regulations designed to protect the competitive position of sellers against resident and non-resident buyers were upheld. In the *Cities Service Case* the court distinguished the *Hood* case on the ground that New York was, in that case, trying to protect the supplies needed for local consumers to the disadvantage of the non-resident consumers rather than to protect the competitive position of suppliers. In the following year the Supreme Court upheld a Michigan requirement that an interstate natural gas pipeline obtain a certificate of necessity and convenience before selling gas directly to industrial consumers in competition with a local supplier who purchased his gas from an interstate pipeline. *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission.*[37]

This line of cases cast considerable doubt on *Buck v. Kuykendall* decided in 1925 where the Court held that a state could not deny a permit to an interstate truck line on the ground that such service was unnecessary in view of existing facilities. On the other hand the Court as late as 1948 exhibited this hostility to a regulation designed to control the competition of outsiders in *Toomer v. Witsell.*[39] In this case a regulation about licenses, berthing and other matters appeared to the court to have as a primary purpose the preference of local commercial fishermen over non-residents and the court had no difficulty in striking it down. But the two chances which the Court had to reconsider Buck v. Kuykendall since the Panhandle case and explain its position have been dodged. In *Fry Roofing Co. v. Wood*,[40] where an interstate motor carrier was required to obtain a certificate called a certificate of convenience and necessity the Court upheld the regulation but on the basis that the Arkansas commission had, as the Commission interpreted the statute, no right to refuse the certificate. Thus the certificate was for identification purposes and not for economic regulation. In *City of Chicago v. Atchison, Topeka and Santa Fe Ry. Co.*[41] decided in June 1958, the licensing statute clearly gave the City power to refuse the certificate on economic considerations and the Court held the ordinance bad but not on the basis of the Commerce Clause but on a conclusion that the Interstate Commerce Act precluded the city

from exercising any veto power on economic considerations over the interstate transfer service.

While we can say that if the purpose and effect of the regulation is to restrict seriously the competition between local and interstate competitors for a particular supply or consumers market, the Court will closely scrutinize the regulation, we cannot, from this factor predict with accuracy the outcome of the case. At this point a very significant factor is the tradition or convention of regulation. Thus in the raisin case, Parker v. Brown, the state regulation was in the pattern of a previously approved Congressional policy; in the interstate pipeline cases the Congressional regulation was built upon certain assumptions as to what the states could do and were doing. National regulation of railroads is old and strong; state regulation of trucks is equally strong. It is this long standing conventional pattern of regulation, almost as much as the financial stake of the states in ownership of the highways, which explains why the regulation of trucks and motor buses seems to be treated so much differently from regulation of similar matters with railroads. The court usually emphasizes this point by saying that "there are few subjects of state regulation affecting interstate commerce which are so peculiarly of local concern as the use of the state's highways." The Court has, of course, in no small part contributed to the truth of this statement by allowing the states more power over trucks than over trains.

But having determined that the subject matter of the regulation is a clearly permissible local subject is not enough to sustain the validity of the state regulation. The next step is to determine the extent of the burden on interstate commerce. At one extreme are the situations where the regulation wholly prohibits the interstate activity or transaction; at the other are the situations where the regulation is at most a certain amount of paper work, red tape and predetermination of the action to be taken. The seriousness of the burden also is involved and this varies with the need for uniformity and the strength of the interests of the states.

Two cases will illustrate the applicability of these considerations and how the seriousness is estimated.

In *Clason v. Indiana*[42] in 1939 a comprehensive Indiana statute dealing with the disposal of the bodies of large dead animals required the bodies to be disposed of by the owner either at the place of death or by transportation to a disposal plant licensed and inspected by the state. Thus the statute prohibited the export of such bodies and also the import of them. The conviction of a person transporting such a body without a license to a disposal plant out of the state was upheld as a health and safety measure which could be enforced only if transportation was limited to delivery to licensed and inspected disposal plants. Here it appeared to the court that the only method of achieving the legitimate state objective was the prohibition of interstate commerce altogether. It further appeared that the state interest outweighed any national interest in the free transportation of such bodies.

This case may be contrasted with *Dean Milk Co. v. Madison*[43] in 1951. A Madison, Wisconsin, ordinance made it unlawful to sell milk in Madison unless it had been processed and bottled at an approved pasteurization plant within a radius of five miles from the center of Madison. The objective of the ordinance was obvious and the problem of inspecting milk processed at a distance away from the location of the inspectors was recognized. The majority concluded however that the ordinance was invalid because there were alternative methods of securing the legitimate local interest. In short the state may exclude an interstate transaction in order to achieve a serious local objective if it appears that there is no reasonable way to achieve the objective other than the one selected. *Castle v. Hayes Freight Lines Inc.*[44] also belongs in this category. The question was whether Illinois could bar an interstate motor carrier from use of state highways for interstate purposes as punishment for repeated violations of the state highway weight regulations. The Supreme Court agreed with the Illinois Supreme Court that it could not. Not only did the state fail to show that suspension of intrastate business rights would not be sufficient to secure compliance but also that the federal motor carrier act provided the state with a procedure whereby it could secure suspension of the federal certificate to operate in interstate commerce by the Commerce Commission. The available alternatives made the selected regulation seem drastic.

At the other extreme from complete prohibition of interstate commerce is the situation where the burden seems so infinitesimal as to be almost de minimus. Of the cases in recent years which fall in this category, *Fry Roofing Co. v. Wood*[45] in 1952, *Terminal RR Ass'n of St. Louis v. Brotherhood*[46] in 1943 and *Carter v. Virginia*[47] in 1944 are illustrative. In the first an interstate motor carrier was required to obtain a certificate called a certificate of convenience and necessity but one which the Arkansas commission conceded it had no right to refuse. The Court held that Arkansas could require interstate motor carriers to identify themselves. In the *Terminal Railroad* case the state commerce commission ordered a terminal railroad operating in East St. Louis to provide cabooses on its trains. This was upheld even though some of the runs went across state lines and back. In the *Carter* case

the Virginia Alcoholic Beverage Act required transporters of liquor through Virginia to file a paper designating the consignee and the direct route through the state and a bond assuring performance. This was upheld as a necessary adjunct of the state regulation of liquor within the state.

In between these two extremes—complete prohibition and a requirement of notices and other minimal activity, we have the great bulk of the cases and also the area of most difficult judgment. It is here that the Courts must assess the relative weights of state and national interests. The cases also indicate significant factors here. One broad category which is perhaps a continuation of the one suggested above is distinguishing a regulation which is in the nature of a physical obstruction to the free movement of goods and one which imposes only greater financial costs. This contrast is seen in the *Southern Pacific* case involving the Arizona Train Limit Law and *Collins v. American Bus Lines Inc.*[48] involving the applicability of an Arizona Workmen's Compensation law to the death in Arizona of a non-resident employee of an interstate bus company. The train crew law not only imposed greater costs on interstate commerce, it necessitated conversion and reconversion of train lengths with consequent delay in traffic time and diminution of volume moved in a given time. The court regarded this burden in the physical sense to be extremely significant in balancing the state's interest in safety against the national interest of free movement of commerce. It thus distinguished the train size cases from state laws prohibiting the car stove, requiring locomotives to be supplied with headlights and the like which at most increased the financial costs of commerce. These did not affect uniformity of train operation. In the *Collins* case the court pointed out that the *Southern Pacific* case was not at all applicable because here the burden on interstate commerce was at most financial.

When the court is acting as arbiter, under the Commerce Clause, it uses many factors which in varying combinations produce varying results. Underlying almost all factors is the court's assessment of the ability of normal political processes to correct any excess in regulation. Thus in the Southern Pacific case, the court in explaining the difference between truck and railroad regulation made this observation: "The fact that they (regulation of trucks on highways) affect alike shippers in interstate and intrastate commerce in great numbers within as well as without the state, is a safeguard against regulatory abuse."[49] The milk cases and the Oklahoma regulation of the price of natural gas at the well-head also contain this element. Because of the large number of local as well as out-of-state consumers, an abusive regulation designed to increase the price which a local seller may charge to all of his customers may be corrected by the electoral process. On the other hand if a state seeks to give its suppliers a competitive advantage in the market for the custom of local consumers, the out-of-state producer does not have as effective a political process to obtain an elimination of the competitive advantage.

The factors which seem most significant for a state court judge in making this arbitration in the first instance seems to be these: (1) Whether the field of state regulation is one which the states have traditionally occupied. Highway regulations are an example. (2) What, considering the effect of the statute as well as its recited purpose, seems to be its true objective. A presumption of constitutionality is not to be used as a substitute for thorough analysis of the situation. (3) Assuming the objective of the legislation to be within permissible bounds such as protecting the health and safety of the state citizens, are there any relevant data for an informed judgment as to the seriousness of the burden of the regulation on commerce. If there is not the state legislation should not be invalidated. (4) Assuming the objective of the regulation to be in the field of regulating the position of competitors, the state court should examine carefully the effect of the regulation and should require rather persuasive reasons to find the effect of no significance.

Although there may be some inconsistency in the cases, such as the tolerance of state regulation of interstate pipelines and interstate purchasers from farmers, in the main, the court in the past twenty years has exhibited no marked tendency to depart from traditional approaches to an ancient problem. The Court is making a value judgment and in so doing it has expanded state power under the commerce clause.

At the same time that this expansion of state power has occurred, the Supreme Court has been increasingly concerned with the question whether a federal act in the field of commerce regulation supersedes a state act in the same field. This is to be expected for no other reason than that Congress is legislating in many more areas of economic life than it did when *Munn v. Illinois* was decided in 1876. So are the states legislating in more areas than in 1876. More cases involving the supremacy of federal statutes over state statutes should therefore be expected.

It requires no disagreement with the doctrine of federalism under our constitution to say that when a state and federal act covering the same general subject puts the regulated person in the position that if he complies with one act he must defy or violate the other, then the federal act controls or supersedes or displaces the state act. The Union could not hold together without such a rule as the Supremacy Clause making the Constitution and the laws of the United

States supreme over state laws. This kind of conflict between federal and state law seldom arises since most regulation is prohibitory or negative in form and does not require that which is permitted. Thus a federal law prohibiting truck bodies greater than 10 feet in width on an interstate motor truck would not conflict, in this sense, with a state law prohibiting truck bodies greater than eight feet in width. Compliance with the eight-foot law of the state would not require a violation of the federal ten-foot law.

It requires no discussion to show that when Congress has provided all of the regulation it deems desirable for a given bit of commerce that state action is excluded. The problem is the factors to be used to determine when Congress intends there to be no further regulation. The factors used depend, in no small part, on the attitude of the judges toward centralism and federalism. In the past, and today by a minority of the court, we have been reminded that respect for the federal system requires a belief that federal acts do not displace state acts unless Congress say so.[50] The rule prior to *Hines v. Davidowitz,* in 1941 seemed to be that state law was not displaced "unless the statute plainly and palpably . . . encroaches upon the exercise of some authority delegated to the United States . . ." (Stone J. Dissenting).[51] Prior to 1940 the bloc on the court who believed that there was little in the Constitution restricting the states under the Fourteenth Amendment or Commerce Clause also believed that the court should not infer that Congress intended to displace state law when it legislated. Since 1940 the dominant majority, while finding little in the Constitution restricting state economic regulation, has been quick to find that state law is displaced.

The Court has never taken the position that there is no displacement unless Congress expressly directs supersedure or unless there is an essential conflict. It has always drawn inferences from the policy and effect of the state and federal laws in question. The result is that we have had the decision described by Justice Butler in 1939: "Our decisions provide no formulae for discovering the implied effect of federal statutes upon state measures."[52]

Two cases under the Federal Pure Food and Drug Act[53] in 1912 and 1913 illustrate the problem. The federal act prohibits, among other things, interstate shipment of food and drugs if misbranded by bearing any statement, design or device which is false or misleading. An Indiana statute required the labels on certain food offered for sale in that state to disclose the formula for the food. A Wisconsin statute required glucose mixtures offered for sale to contain on the label one designation "glucose flavored with . . ." and prohibited any other designation. As an original proposition it could be argued that since the federal act dealt with statements on the labels of food and drugs, any state law dealing with statements on the package was displaced. At the other extreme it could be argued that until the state acts required a statement on the package which the federal act called misleading the state acts should be allowed to stand as there was no conflict. The Supreme Court upheld the Indiana act in 1912[54] and struck down the Wisconsin act in 1913.[55] In the latter case the court found an inconsistency in policy between the federal act which permitted any label or statement as long as not misleading and the state act which permitted only one type of label.

Over time the court has used a number of tests or doctrines which become so confused in statement and application that it is often difficult to decide which test is being used. The simplest test is that of conflict between state and federal act but this test has been referred to in recent years only when the court upholds state legislation. The highwater mark of this test is *Mauer v. Hamilton*[56] decided in 1940. The question was whether a Pennsylvania statute prohibiting the operation on its highways of motor vehicles carrying other vehicles over the cab was superseded by rules concerning safety of equipment promulgated by the Interstate Commerce Commission.

After extensive hearings the Commission had issued a report in which it concluded that there was no evidence of the load over the cab being unsafe and it issued rules concerning safety of truck equipment which omitted regulation of the load over the cab. The Supreme Court upheld the state statute against a claim of supersedure. It analyzed the legislative history and the federal statute to find that Congress was hesitant to enter the field of weight regulation in which the states had a special interest because of their investment in the highways. The Court refused to infer that the Congress intended to displace state regulations by its own entry into regulation of safety and operation and equipment. The Court said that "As a matter of statutory construction Congressional intention to displace local laws in the exercise of its commerce power is not, in general, to be inferred unless clearly indicated by those considerations which are persuasive of the statutory purpose." In assessing today's critical comment note should be taken that comment on this case thought the court went too far in upholding state action.[57]

The shift in emphasis began the next year in 1941 in *Hines v. Davidowitz*[58] which is not a commerce clause case. The United States had an alien registration act which did not require the alien to carry his identification card. Pennsylvania had an alien registration act which did. The majority of the court held that the state act was superseded because it served

the same general policy and purpose as the federal act. Unless the state action serves some independent purpose within its province, coincidence of the state and federal regulation will require the state act to give way. That the shift in emphasis is not complete and that it is difficult to find a consistent policy can be seen from *California v. Zook*[59] in 1949. California had a statute which imposed a penalty for sale of transportation by a carrier which had no permit from the Interstate Commerce Commission or the California Commission. A regulation of the Commerce Commission covered this type of unscheduled transportation. The question was whether the federal statute superseded the state act. The majority of the court found that it did not. It stated that the coincidence of the two acts is not enough absent some evidence of conflict of policy. This case should be compared with *Pennsylvania v. Nelson*[60] involving the Pennsylvania sedition act where the result was the opposite and the common personnel in the two split-decision cases shifted sides.

Just as the Court attempted to restate the factors involved in a "dormant" commerce clause case in Southern Pacific Co. v. Arizona so it also sought to restate the law in *Rice v. Santa Fe Elevator Corp.*[61] as to the significant factors in a displacement or supersedure case. Mr. Justice Douglas listed as his first factor the historical or conventional classification of the subject: is it a matter which Congress has historically legislated about or is it one in which the states have traditionally acted. If the case falls into the latter category the court is less likely to read federal legislation as precluding any state regulation. In *California v. Zook*, Mr. Justice Murphy refers to the "usual police power of the states" as a useful factor in displacement questions. What does the court mean by "traditional" or "usual"? Apparently not first in the field. In *California v. Zook* it would appear that Murphy really meant, protection of health, safety and protection against fraud. This point of health and safety is also emphasized in *Mauer v. Hamilton* as subjects traditionally belonging to the states. In the Rice case the states were clearly first in time yet the court found displacement of state law. The regulation was of prices, selling practices and other factors commonly found in highly regulatory economic statutes.

Particularly significant in this historical approach to the problem is the question whether the subject became national because of earlier Supreme Court decisions excluding the states from regulation. If earlier Supreme Court decisions had precluded the states under the commerce clause and if Congress thereupon began regulating the matter, then state regulation is thereafter precluded even though subsequent interpretations of the Constitution would allow the states to regulate. Likewise if the earlier decisions had carved out an area of permissible state regulation then subsequent federal legislation designed to fill in the gaps will not be interpreted as ousting the states. Many of the supersedure cases under the Natural Gas Act are illustrative of this principle.[62] Prior to this act, the Supreme Court had held that the states could not regulate the sales for resale by interstate pipelines and gas companies but the states could regulate direct sales of such companies to local consumers. The Supreme Court has suggested that the states could now regulate both types of sales. But in the meantime the Natural Gas Act of 1938 was passed for the purpose of regulating activity which in 1938 the court had said the states could not regulate. The cases fairly consistently hold that Congress has occupied the field which the old Supreme Court said the states could not regulate but that the federal act does not occupy the field which the old Supreme Court said the states could regulate.

Parker v. Motor Boat Sales[63] in 1941 is an extreme illustration of the significance of this factor. The Longshoremen's Act specifically said that the Federal Act should not apply where recovery under local workmen's compensation acts could validly be had under state law. In 1917 in *Southern Pacific v. Jensen*[64] the Supreme Court had decided that the jurisdiction of Congress over admiralty was so exclusive that a state workmen's compensation law could not be applied to those employees in admiralty, such as longshoremen, not covered by the federal act concerning seamen. Subsequently the Congress filled up this gap between the Jones Act, applicable to seamen, and state workmen's compensation laws by enacting the longshoremen's act but with the proviso mentioned above. In the Parker case an office employee of a boat dealer was drowned on inland navigable waters while demonstrating a boat. The Virginia workmen's compensation act was in terms applicable and under constitutional doctrine current by 1941 could constitutionally be applied. The Supreme Court held that the federal law occupied the field. It interpreted the proviso as meaning state law was applicable to the extent *Southern Pacific v. Jensen* and its doctrine would have permitted.

If the field of regulation is one traditionally occupied by the states then a further question concerning displacement is necessary and that is whether it can be inferred that the Congressional intent is to displace state law. Four factors are here relevant according to the Rice case. The pervasiveness and scope of the federal act is significant. The more it appears to be a complete system of regulation the more likely state acts are to be displaced. Although

there are no cases under the act, it is doubtful that state law touching atomic energy, even the extent of tort liability can survive the Atomic Energy Act for this reason.

Cloverleaf Butter Co. v. Patterson[65] in 1942 is illustrative both of this principle or factor and the difficulty of its application. The federal act in question regulated the processing of renovated butter for health and sanitation purposes, admittedly a purpose traditionally within the state police power. It was a comprehensive statute which dealt with renovated butter at two points in the processing and distribution system: it imposed rigid sanitary procedures on the manufacture and distribution of such butter; and it subjected butter approved by the federal inspectors to the laws of the importing state. The Alabama act in question, for the same objectives regulated the other end of the process which the federal act had left unregulated: the packing stock butter from which the finished product subject to federal and state regulation came and to which the manufacturing process subject to federal regulation was applied. The majority of the Supreme Court thought that the all pervasive federal scheme supported an inference that Congress wanted the raw material left unregulated. The minority thought this inference was not overwhelmingly supportable and it relied on a presumption of no displacement.

Secondly, said Justice Douglas in the *Rice* case, the federal act may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. This, according to Douglas, is the basis of *Hines v. Davidowitz* to which reference has been made. The alien registration act touched an area in which the federal interest was dominant—field of foreign affairs; power over immigration and naturalization and deportation. A similar case is *Pennsylvania v. Nelson.*[66]

Third, the object of the federal act and the character of the obligation imposed thereby may reveal a purpose to supersede the states. Examples of this type of supersedure are instances where federal legislation was avowedly passed to obtain uniformity such as the safety appliance act.[67]

Finally, state policy may produce a result inconsistent with an objective of the federal act. Many of the labor supersedure cases are of this variety. *Hill v. Florida*[68] in 1945 where a Florida law requiring registration of union business agents was found to conflict with the policy of the national labor relations act is illustrative.

After listing these factors Mr. Justice Douglas adds that the cases which do not fall into any of these categories are "difficult" cases. As examples of difficult he cites two cases where state power was upheld: *South Carolina Highway Department v. Barnwell Bros.*[69] (width and weight regulation of interstate trucks); and *Union Brokerage Co. v. Jensen*[70] (federal license of a customs broker v. qualification under Minnesota Foreign corporation act). Unless the justice is cavalier in his citations, the reference to these cases as "difficult" is really revealing of an intent on Douglas' part to sweep aside past law and indeed to change the rule of construction. The areas of law referred to in these cases have traditionally been regulated by the states even though there is also some federal regulation and the court has seldom had sharp divergence of views on these matters. This reference may well mean that Douglas is prepared to sweep all other rules aside and apply only one test to which he refers in the Rice case. He summarizes the matter by saying:

> "The test, therefore, is whether the matter on which the State asserts the right to act is in *any way* regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *(Italics supplied.)*

The latest case on displacement of state law, *City of Chicago v. Atchison, Topeka and Santa Fe Ry. Co.*,[71] would seem to indicate that the court has about reached this point. In that case the City proposed to require a certificate of necessity from the carrier selected by the railroads to provide transfer service between stations in Chicago. Without reference to any legislative history or any of the tests referred to in the Rice case, the majority concluded that two general sections of the Interstate Commerce Act imposing a duty on carriers to establish through routes and passenger interchanges made Chicago impotent to license the transfer agent. These cases seem to have eliminated a search for Congressional intent as to supersedure and substituted the court's judgment whether the state act might be inconsistent with some unexpressed Congressional policy. The only search for Congressional intent seems now to be a search for an intent not to displace. Thus in *Rice v. Board of Trade*[72] Justice Douglas found no displacement of state regulation of boards of trade by the Commodity Exchange Act[73] which had an express reservation of state power in some sections. Douglas reasoned that if Congress used such care to preserve state authority where conflict possible, there is no displacement where there is no conflict.

There is a definite trend in the Court toward a reversal of the historic attitude toward this problem. The reversal of attitude can only mean that the doctrine of federalism has suffered. A *true* federalist cannot regard state exercise of power as unique where Congress has also acted. A nationalist cannot expect

the states to legislate on many subjects without the consent of Congress. But the important point is, that the problem is one for Congress. If it expresses itself either generally or specifically as to its desires on the displacement question, there is little indication that the Court will ignore a clear Congressional mandate.

FOOTNOTES

[1] See 2 Warren, The Supreme Court in United States History (Rev. Ed. 1926) 574-591.

[2] 94 U. S. 113 (1876). The cases decided at the same time as *Munn v. Illinois* were concerned with state regulation of railroad rates. *Chicago, B. and Q. R. R. v. Iowa*, 94 U. S. 155 (1876); *Peik v. Chicago and N. W. Ry.*, 94 U. S. (1876); *Chicago, Milwaukee and St. Paul R. R. v. Ackley*, 94 U. S. 179 (1876); *Winona and St. Peter R. R. v. Blake*, 94 U. S. 180 (1876); and *Stone v. Wisconsin*, 94 U. S. 181 (1876).

[3] For a discussion of the significance of these cases see Frankfurter, The Commerce Clause (1937) pp 83-90; Trimble, Chief Justice Waite (1938) pp 175-184.

[4] 2 Warren, op. cit. supra n. 1 p. 574, 581.

[5] *Nebbia v. New York*, 291 U. S. 502 (1934).

[6] United States Warehouse Act of 1916, 39 Stat. 486, 7 U. S. C., §§241-273. The Illinois statute was L. Ill. 1871, p. 762. It was repealed in 1955 and replaced by a new act, Ill. Rev. Stat., Ch. 114, §§214.1-214.27.

[7] 331 U. S. 218 (1947).

[8] 39 Stat. 490, Sec. 29 "Nothing in this Act shall be construed to conflict with . . . or . . . to impair or limit the effect or operation of the laws of any State . . .;"

[9] 46 Stat. 1465 "the power, jurisdiction and authority conferred upon the Secretary of Agriculture . . . shall be exclusive . . . "

[10] In his book on the Commerce Clause, Professor Frankfurter, as he then was, noted that the federal act had assumed partial control "and to some extent dislodged the states" but he refused to speculate on the extent of the supersession. In *Rice v. Santa Fe Elevator Corp.*, infra n. 58, Justice Frankfurter thought the 1931 amendment only outlawed "conflicts" between the two statutes.

[11] U. S. Constitution, Art. I, Section 9.

[12] U. S. Const. Art. I, Sec. 8 cl. 3.

[13] See Crosskey, Politics and the Constitution (1953) pp. 17-363.

[14] 5 How. 504, 579 (1847).

[15] 12 How. 299 (1851).

[16] *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 767 (1945). For other expressions of this doctrine see *California v. Zook*, 336 U. S. 725, 728 (1949); *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U. S. 179, 186 (1950).

[17] Ibid. at 769.

[18] See the dissenting opinions in: *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 442 (1939); *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 784 (1945); and concurring opinion in *Morgan v. Virginia*, 328 U. S. 373 at 386 (1946).

[19] 328 U. S. 373 (1946).

[20] 336 U. S. 525 (1949). See also his concurring opinion in *Duckworth v. Arkansas*, 314 U. S. 390 at 397 (1941).

[21] State taxation of interstate commerce is more difficult than regulation because there are usually many other sources of revenue available. See Frankfurter dissenting in *Hood & Son v. DuMond*, 336 U. S. 525 (1949).

[21a] See Stern, Commerce and Due Process, 4 Vand. L. Rev. 446, 460 (1951).

[22] See *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769 (1945). The leading case sustaining the power of Congress to authorize state regulation of interstate commerce is *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408 (1946).

[23] Op. cit. supra n. 16.

[24] See *Gibbons v. Ogden*, 9 Wheat. 1 (1824).

[25] *Brown v. Maryland*, 12 Wheat. 419 (1827).

[26] See discussion in *Interstate Natural Gas Co. v. Power Commission*, 331 U. S. 682 (1946).

[27] The best attack on the mechanistic formulae is found in the dissent of Stone in *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927) and his discussion of the formulae in *Parker v. Brown*, 317 U. S. 341, 360 (1943); *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498, 504 (1941). See also Freund, Umpiring the Federal System, 54 Col. L. Rev. 561, 567 (1954).

[28] *DiSanto v. Pennsylvania*, 273 U. S. 34, 44 (1927).

[29] Op. Cit. supra n. 16.

[30] Ibid. at 775.

[31] 306 U. S. 363 (1939).

[32] 336 U. S. 525 (1949).

[33] Ibid. at 533.

[34] 306 U. S. 346 (1939).

[35] 317 U. S. 341 (1943).

[36] 340 U. S. 179 (1950).

[37] 341 U. S. 329 (1951).

[38] 267 U. S. 307 (1925).

[39] 334 U. S. 385 (1948).

[40] 344 U. S. 157 (1952).

[41] U. S. (1958).

[42] 306 U. S. 439 (1939).

[43] 340 U. S. 349 (1951).

[44] 348 U. S. 61 (1954).

[45] 344 U. S. 157 (1952). See also *Railway Express Agency v. New York City*, 336 U. S. 106 (1949) (state statute prohibited advertising in trucks).

[46] 318 U. S. 1 (1943).

[47] 321 U. S. 131 (1944).

[48] 350 U. S. 528 (1956).

[49] See *Southern Pacific Co. v. Arizona*, supra n. 14 at 783. For other motor carrier cases see *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 184 (1938); *California v. Thompson*, 313 U. S. 109 (1941) licensing of transportation agents for motor carrier travel; *Ry/Express Agency v. New York*, 336 U. S. 106 (1949) prohibition of advertising on trucks; *Buck v. California*, 343 U. S. 99 (1952) permit required for a taxi cab operating through licensing authority but not discharging there.

[50] See Frankfurter J. dissenting in Bethlehem Steel Co. v. State Labor Relations Board, 330 U. S. 767, 780 (1947).

[51] 312 U. S. 52 (1941).

[52] See *H. P. Welch & Co. v. New Hampshire*, 306 U. S. 79, 84 (1939).

[53] 34 Stat. 768, 21 U. S. C., §§1-40.

[54] *Savage v. Jones*, 225 U. S. 501 (1912).

[55] *McDermott v. Wisconsin*, 228 U. S. 115 (1913).

[56] 309 U. S. 598 (1940).

[57] See e.g. comment, Power of States to Regulate Interstate Motor Carriers, 39 Mich. L. Rev. 631, 633-637 (1941).

[58] 312 U. S. 52 (1941).

[59] Op. cit. supra n. 16.

[60] 350 U. S. 497 (1956).

[61] 331 U. S. 218 (1947).

[62] See e.g. *P. U. C. of Ohio v. United Fuel Gas Co.*, 317 U. S. 456 (1943); *Interstate Natural Gas Co. v. Power Commission*, 331 U. S. 682 (1946); *Panhandle Eastern Pipe Line Co. v.*

P. S. C. of Indiana, 332 U. S. 495 (1947); *F. P. C. v. East Ohio Gas Co.*, 338 U. S. 464 (1949); *Panhandle Eastern Pipe Line Co. v. Mich. P. S. C.*, 341 U. S. 329 (1951); *Phillips Petroleum v. Wisconsin*, 347 U. S. 672 (1954); *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U. S. 44 (1955).

[63] 314 U. S. 244 (1941).

[64] 244 U. S. 205 (1917). See also *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149 (1920); *Washington v. W. C. Dawson*, 264 U. S. 219 (1924).

[65] 315 U. S. 148 (1942).

[66] Op. cit. supra n. 60.

[67] Douglas cites for this proposition *Southern R. Co. v. Railroad Commission*, 236 U. S. 439 (1915) (Safety Appliance Act); *Charleston & W. C. R. Co. v. Varnville Co.*, 237 U. S. 597 (1915) (Carmack amendment on liability of carrier for damage to goods; *New York Central R. Co. v. Winfield*, 244 U. S. 147 (1917) (Federal Employers' Liability Act); *Napier v. Atlantic Coast Line R. Co.*, 272 U. S. 605 (1926) (Federal Locomotive Boiler Inspection Act).

[68] 325 U. S. 538 (1945).

[69] 303 U. S. 184 (1938).

[70] 322 U. S. 202 (1944).

[71] U. S. (1958).

[72] *Rice v. Board of Trade*, 331 U. S. 247 (1947).

[73] U. S. C.

The Supreme Court, The Due Process Clause, and The In Personam Jurisdiction of State Courts: 1877-1958

By PHILIP B. KURLAND
Professor of Law
The University of Chicago Law School

"*When the ignorant are taught to doubt they do not know what they safely may believe. And it seems to me at this time we need education in the obvious more than investigation of the obscure.*"

Holmes, Collected Legal Papers 292-93 (1920)

In matters of personal jurisdiction of state courts, no less than in matters of the jurisdiction of the federal courts,[1] doctrines of federalism have been subordinated by the Supreme Court to concepts of convenience. The result is another major step—in this instance, perhaps a desirable one—toward the limitation of the federal principle. For state lines may be as easily erased by the enhancement of state power as by the expansion of national authority. To the extent that one state's judicial control over a legal controversy is increased, the control of all other states over that controversy is diminished. That this creates serious problems for a federation was recognized early in American constitutional history.

I. "WHAT'S PAST IS PROLOGUE"

In 1813, the Supreme Court of the United States was called upon to decide whether a plea of *nihil debet* was a good defense in the United States Circuit Court for the District of Columbia in a suit brought on a judgment secured in a state court in New York.[2] The New York judgment had been rendered in a suit in which personal jurisdiction was obtained over the defendant by his arrest within that state. The Supreme Court of the United States held that since the judgment would have been enforced by another New York court, it must also be enforced in the District of Columbia because of Congress' statute implementing the Full Faith and Credit Clause of the Constitution.[3] "If," said Mr. Justice Story for the Court, "it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record;* and when Congress gave the effect of a record to the judgment it gave all the collateral consequences."[4] Mr. Justice Johnson dissented. He urged that *nihil debet* was a proper plea in defense to a suit on a foreign judgment. He was led to this dissent by reasons expressed in language which, as in the case of many of his dissents, proved to be of greater appeal to his successors than to his contemporaries. His position was not that the New York judgment was not entitled to full faith and credit, but rather that a court which was asked to enforce it had a right to determine whether the court rendering it had properly obtained jurisdiction. This could be done, he said, only if *nihil debet* were available as a defense:

> I am induced to vary in deciding on this question from an apprehension that receiving the pleas of ***nul tiel record*** may at some future time involve this court in inextricable difficulty In the case of Holker and Parker, which we had before us this term, 7 C. 436, we see an instance in which a judgment for $150,000 was given in Pennsylvania upon an attachment levied on a cask of wine, and debt brought on that judgment in the State of Massachusetts. Now if in this action ***nul tiel record*** must necessarily be pleaded, it would be difficult to find a method by which the enforcing of such a judgment could be avoided. Instead of promoting, then, the object of the constitution by removing all causes for state jealousies, nothing could tend more to enforce them than enforcing such a judgment. There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with but when compelled by positive statute. One of these is, that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits. But if the States are at liberty to pass the most absurd laws on this subject, and we admit of a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given that article of the constitution in direct hostility with the object of it.[5]

By the time of *Pennoyer v. Neff*,[6] in which are to be found the origins of our modern law of personal jurisdiction, Johnson's thesis had long been accepted by the Court. The case arose on facts similar to those which had troubled Johnson. The question was the effect required to be given to an Oregon judgment, pursuant to which a sheriff's sale purported to transfer title to the defendant's land located in Oregon. In the first suit, the defendant had been given notice only by publication in Oregon, in accordance with an Oregon statute. He was domiciled elsewhere, presumably in California. The Supreme Court held the Oregon judgment invalid. The opinion for the Court, written by Mr. Justice Field, relied on Johnson's "eternal principle" to secure the result and cited Story's *Conflict of Laws* to substantiate this conclusion.[7]

No personal jurisdiction was acquired over the defendant:

> . . . where the entire subject of the action is to determine the personal rights and obligations of the defendants, that is,

where the suit is merely *in personam*, constructive service . . . upon a non-resident is ineffectual for any purpose. Process from the tribunals of one State cannot run into another State, and summon parties thus domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the State, and process published within it, are equally unavailing in proceedings to establish his personal liability.[8]

The presence of the property within the state did not authorize personal jurisdiction; it could authorize exercise of jurisdiction over the property if properly invoked:

. . . the State, through its tribunals, may subject property situated within its limits owned by non-residents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the State where the owners are domiciled. Every State owes protection to its own citizens; and, when non-residents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such non-residents to satisfy the claims of its citizens. It is in virtue of the State's jurisdiction over the property of the non-resident situated within its limits that its tribunals can inquire into the non-resident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the non-resident has no property in the State, there is nothing upon which the tribunals can adjudicate.[9]

But jurisdiction over the property in the *Pennoyer* case was wanting because of the failure of the plaintiff to levy on the property at the commencement of the action. The jurisdiction of a court cannot attach where its validity will depend upon whether property of the defendant is discovered within the state after the entry of the judgment.[10]

Once again a dissent seemed to demonstrate more prescience than the majority. Mr. Justice Hunt would have ruled that:

. . . It belongs to the legislative power of the State to determine what shall be the modes and means proper to be adopted to give notice to an absent defendant of the commencement of a suit; and if they are such as are reasonably likely to communicate to him information of the proceeding against him, and are in good faith designed to give him such information, and an opportunity to defend is provided for him in the event of his appearance in the suit it is not competent to the judiciary to declare that such proceeding is void as not being due process of law.[11]

Lest this language be considered more expansive than it really was, it should be noted that Hunt was talking only of suits against defendants owning property within the state, i.e., actions in rem, or quasi in rem. He was not then suggesting that a state legislature could create nationwide in personam jurisdiction for its courts. It fell to later decisions to suggest such extensions of his principles.[12]

The importance of *Pennoyer v. Neff*, however, rests not on its holding, which denied full faith and credit to the Oregon judgment,[13] but rather on its dicta which read Johnson's "eternal principle" into the Due Process Clause, a provision of the Constitution not applicable to the case then before the Court:

Since the adoption of the Fourteenth Amendment . . . the validity of such judgments may be directly questioned, and their enforcement in the State resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law . . . To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.

Except in cases affecting the personal *status* of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance . . . substituted service . . . where actions are brought against non-residents, is effectual, only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem* . . . [14]

Field went further in giving content to the Due Process Clause in this area:

To prevent any misapplication of the views expressed in this opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident . . .

Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice of legal proceedings instituted with respect to such partnership, association, or contracts, or to designate such place that service may be made and notice given, and provide, upon their failure, to make such appointment or to designate such place that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such service may not be binding upon the non-residents both within and without the State . . . Nor do we doubt that a State on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service on their officers or members . . . [15]

Pennoyer v. Neff thus established the principle that a judgment is entitled to full faith and credit only if it satisfies the requirements of the Due Process Clause, for if it doesn't meet those requirements it is not properly enforcible even within the State which rendered it. In a fashion not uncommon to the Su-

preme Court of the United States, it thus purported to decide many questions which were not before it.

Between *Pennoyer v. Neff* and *International Shoe Corp. v. Washington*,[16] the courts, both state and national, were occupied in filling the interstices of the doctrines announced by Field and in stretching the concepts of consent and presence to authorize jurisdiction where consent in fact did not, and presence could not, exist. The rapid development of transportation and communication in this country demanded a revision of Johnson's "eternal principle" incorporated by Field in the Due Process Clause: "eternal principles" which were appropriate for the age of the "horse and buggy" or even for the age of the "iron horse" could not serve the era of the airplane, the radio, and the telephone.[17] "It was characteristic of our legal institutions, however, that the first approaches to a solution of the problem, both in the legislatures and in the courts, were made not in terms of a bold adjustment of legal concepts to a novel social problem, but in terms that purported to fit the new provisions into the established framework of jurisdictional concepts."[18] By 1945, even the Supreme Court of the United States recognized the necessity for the substitution of appropriate doctrine for the "fictive"[19] rules which had developed under the aegis of *Pennoyer v. Neff*. To understand the changes in doctrine, if not necessarily in result, which have followed the *International Shoe* case, it is proposed to state briefly the guiding rules existent at the time that decision was rendered. If these rules may be stated fairly succinctly, it should be noted that they were not to be applied with equal ease.

A. *Personal Jurisdiction Over Individuals*

As indicated in Johnson's opinion in *Mills v. Duryee*,[20] service of process[21] on an individual within a state is sufficient to create personal jurisdiction over him, although the state may eschew such power if the defendant's presence was procured by the fraud or force of the plaintiff,[22] or if the defendant is afforded a status which immunizes him from service of process.[23] The derivation of the rule was succinctly stated by Mr. Justice Holmes: "The foundation of jurisdiction is physical power."[24] This rule does not exist in civil law[25] and has been the object of cogent criticism,[26] inasmuch as it affords a basis for jurisdiction over defendants whose relationship to the state may be accidental and fleeting and regardless of the place of origin of the claim asserted. But if any change is to take place in this rule it is more likely to be through the avenue of *forum non conveniens* than the Due Process Clause, although the "new doctrine" of appropriate connection with the state of the forum could well be developed to limit as well as expand state judicial power.[27]

What Johnson spoke of as "allegiance"[28] has also been used for the assertion of personal jurisdiction. Domicile has served state courts as a constitutional base for asserting jurisdiction over absent defendants,[29] just as nationality has been the ground for the assertion of authority by federal courts over absentees.[30] The rationalizations expressed by the courts would not seem to limit this power to cases having a reasonable connection with the forum state, since the state of domicile or citizenship may well provide the only forum in which an elusive defendant may be sued.

Personal jurisdiction may also be exercised over defendants who voluntarily submit to the jurisdiction of the court, regardless of the presence of other connection between the litigation and the forum. Actual consent may be given in advance of litigation by an agreement which calls for the submission of any dispute arising out of the transactions specified in the agreement, whether to a named tribunal or to such tribunal as the future plaintiff may choose. Actual consent creates comparatively little difficulty;[31] the primary source of problems arises in those cases in which the thesis of consent has been extended to cover cases where in fact consent does not exist.[32]

The mere appearance of a defendant in a law suit for a purpose other than to attack the jurisdiction of the court over him is considered a voluntary submission to the court's power.[33] Indeed, even a special appearance to contest personal jurisdiction may be validly treated as a submission to the court.[34] And a plaintiff may be assumed to have agreed to the court's jurisdiction over him not only for the purpose of the claims which he asserts but with reference to claims asserted against him by defendants to the action.[35]

The cases dealing with the non-resident motorist statutes have provided a bridge between the consent cases and the cases in which jurisdiction over the person is predicated on the fact that the defendant has engaged in certain activity within the state.[36] From the doubtful premise that a state may preclude the use of its highways to nonresident individuals,[37] it was thought to follow that a state might condition the use of the highways on receipt of consent to be sued in the state courts for any action arising out of the use of the highways.[38] From the right to demand actual consent, the states were held to be free to imply "consent" by any user so long as service was made within the state.[39] But "[u]nder the statute," the Supreme Court said, "the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the nonresident may be involved."[40] Thirty years later the Court recognized what had long been apparent to others, that "to con-

clude from this holding that the motorist, who never consented to anything and whose consent is altogether immaterial, had actually agreed to be sued . . . is surely to move in the world of Alice in Wonderland."[41]

A more realistic rationalization of the validity of the nonresident motorists statutes might well have provided a basis for jurisdiction over individuals engaged in activities within the state other than driving automobiles. In 1919,[42] Professor Austin W. Scott wrote a most persuasive article in support of the thesis "that a state may constitutionally provide that the doing of business within the state by a nonresident should subject him to the jurisdiction of the courts of the state *as to causes of action arising out of such business;* and that a nonresident by doing business within a state which had made such a provision subjected himself to the jurisdiction of the courts of the state as to such cause of action."[43] In 1926, he concluded another article with the following language: "It would seem that a state may subject a nonresident doing *acts within the state, involving danger to life or property, to the jurisdiction of the courts of the state as to causes of action arising out of those acts.* In particular, it would seem that a state may subject a nonresident operating an automobile within the state to the jurisdiction of the courts of the state as to causes of action arising out of the operation of the automobile."[44] The latter concept was more palatable to the Court. Even while talking about implied consent in *Hess v. Pawloski,* the Court emphasized the fact that "motor vehicles are dangerous machines . . . their use is attended by serious dangers to persons and property."[45] At the same time, however, the Court was careful to state that the "mere transaction of business in a state by nonresident natural persons does not imply consent to be bound by the process of the courts."[46] And without "consent" no jurisdiction would attach[47] because "a state may not withhold from nonresident individuals the right of doing business therein."[48] By 1935, however, the Court was beginning to accept the notion that doing business within a state was sufficient basis for jurisdiction over a nonresident individual, at least where "the business" done could be validly treated by the state "as exceptional" and, therefore, subject to regulation, and service could be made within the state on an agent appointed to carry out that business.[49]

B. In Personam Jurisdiction Over Corporations

A domestic corporation is subject to suit in the courts of the state of its incorporation, whether because it is a creature of that state and therefore necessarily subject to its control, or because it is "domiciled" there, or because it is "present" there.[50]

Foreign corporation have proved more difficult to fit into the concepts which underlie the principles of personal jurisdiction relating to individuals, for it is necessary to speak in "fictive" terms whether the term used is the corporation's "citizenship,"[51] its "domicile," its "consent," or its "presence." "Until toward the middle of the [nineteenth] century, the idea seems to have been widely prevalent that foreign attachment was the only process available against them."[52] In some measure the difficulties flowed from a notion phrased by Mr. Chief Justice Taney in *Bank of Augusta v. Earle*:

> . . . a corporation can have no legal existence out of the bounds of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and when that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation; and cannot migrate to another sovereignty.[53]

This apparently did not mean that a corporation was precluded from engaging in activities beyond the borders of the state of its incorporation. But only that any activity which it conducted outside the state of its incorporation was dependent upon the permission of the government within whose jurisdiction it desired to operate. Strange conclusions, in terms of in personam jurisdiction, necessarily flowed from this strange principle.

As the corporate form of business became more and more the common method of carrying on economic activity, it became incumbent on the courts to make provision for suits by and against such entities in foreign states. Two major theories evolved and merged into a third, none of which proved satisfactory. The first was the "consent" theory, which quickly prevailed in the Supreme Court. The second was a theory of "presence," which became necessary in order to fill the gaps which the "consent" theory did not cover, but which required the rejection of the Taney dictum in *Bank of Augusta v. Earle.* The third was the "doing business" notion.

1. "Consent"

The consent thesis rested on the proposition that, since a foreign corporation could not carry on business within a state without the permission of that state, the state could impose as a condition of engaging in business within its borders a requirement that the corporation appoint an agent to receive service of process within the state. Thus, in *Lafayette Insurance Co. v. French,*[54] Mr. Justice Curtis, speaking for all but one member of the Court, said:

> A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter state. 13 Pet. 519. This consent may be accompanied by such condition as Ohio may think fit to impose; and these con-

ditions must be deemed valid and effectual by other States, and by this court, provided they are not repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence.[55]

The limitations of "public law" and "natural justice" were necessarily vague, and were ultimately to be merged into the Due Process Clause when the Fourteenth Amendment became effective.[56] No really difficult problem was presented by the *Lafayette Insurance* case, for there suit was in Ohio on an insurance policy issued by a resident agent in Ohio on Ohio property with service of process made on the agent in accord with the terms of an Ohio statute which authorized suits on insurance policies in the county in which "the contract may be made." The important limitations on the conditions which could be imposed by the state were set forth later by Mr. Justice Field in *St. Clair v. Cox:*

> The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation *arising out of its transactions in the State,* it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed.[57]

Field reiterated the primary limitation that "the corporation be engaged in business in the State, and the agent to be appointed to act there."[58] The Court later made it clear, too, that the agent must be one who would be likely to inform the corporation of the receipt and content of the process and if service were made on an official or person designated by the state that such person be required to forward notice of the suit to the defendant.[59] The "consent" which a state could demand was held to be a valid base for jurisdiction of the federal courts within that state as well as of state courts.[60]

One of the questions resulting from the adoption of this thesis was whether, if implied consent was confined to cases arising out of transactions within the state as stated in *St. Clair v. Cox*, the consent secured by the actual appointment of an agent by the corporation was similarly limited. Three of America's greatest jurists answered the question in the negative. Lengthy quotation from an early opinion of Judge Learned Hand in *Smolik v. Philadelphia and Reading Co.*[61] will state both the problem and the solution which became the law; it also suggested a doctrine which reappeared in the *International Shoe* case:

> The defendant here argues that the terms of such an implied consent cannot be supposed to be other than that which the state statute attempts to exact, and that if the implied consent is to be limited, as now has been indubitably done, the express consent must be limited in exactly the same way. Were this not true, the defendant urges, an outlaw who refused to obey the laws of the state would be in a better position than a corporation who chooses to conform. The theory of implied consent dialectically requires the same limitations to be imposed upon express consents, at least in the absence of some explicit language to the contrary in the state statute.
>
> The plaintiffs, on the other hand, urge that the express consent of a foreign corporation to the service of process upon its agent . . . must be interpreted in the light of the statutes of the state, giving jurisdiction to its own courts, and that in the cases at bar, residents of New York may . . . sue foreign corporations on any cause of action whatever. While, of course, the jurisdiction of this court over the subject-matter of suits depends altogether upon federal statutes, the question now is of personal jurisdiction, and that depends upon the interpretation of the consent actually given, an interpretation determined altogether by the intent of the state statutes. That intent being determined, there is no constitutional objection to a state's exacting a consent from foreign corporations to any jurisdiction which it may please, as a condition of doing business. Intent and power uniting in the section in question, how is it possible to confine the provision to actions arising from business done within the state?
>
> These two arguments, treated as mere bits of dialectic, lead to opposite results, each by unquestionable deduction, so far as I can see. One must be vicious and the vice arises I think from confounding a legal fiction with a statement of fact. When it is said that a foreign corporation will be taken to have consented to the appointment of an agent to accept service, the court does not mean that as a fact it has consented at all, because the corporation does not in fact consent; but the court for purposes of justice, treats it as if it had. It is true that the consequences so imputed to it lie within its own control, since it need not do business within the state, but that is not equivalent to a consent; actually it might have refused to appoint, and yet its refusal would make no difference. The court in the interests of justice, imputes results to the voluntary act of doing business within the foreign state, quite independently of any intent.[62]

Judge Cardozo, as he then was, reached the same conclusion, saying that: "The distinction is between a true consent and an imputed or implied consent, between a fact and a fiction."[63] And Mr. Justice Holmes spoke for the Supreme Court in arriving at the same destination.[64] One may wonder how, in rejecting the fiction of consent for the corporations which have not appointed agents, these three could have found "a true consent" in the appointment of an agent in conformity with statutes, especially when the statutes have not suggested different treatment for extorted actual consent and the equally unwilling implied consent. Holmes said only that:

> . . . when a power actually is conferred by a document, the party executing it takes the risk of interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act.[65]

One may wonder, too, why, if it was the Due Process Clause—or a "principle of natural justice"—which

denied the power of the state to imply consent to suit on claims arising out of transaction occurring elsewhere than within the state, it did not also deny to the state the power to extort such a consent in writing. Certainly the *St. Clair* case on which these cases are predicated drew no such distinction.

There was still another major difficulty with the consent thesis. The Privileges and Immunities Clause did not prohibit a state from excluding a foreign corporation. This point was made pellucidly in *Paul v. Virginia*[66] in language quite reminiscent of Taney's in *Bank of Augusta v. Earle:*

> The corporation being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created . . . Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their consent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion.[67]

But insurance, which was the subject of the business involved in that case, was not then considered "interstate commerce."[68] And it soon became established law that a foreign corporation could not be prevented by a state from carrying on interstate commerce within its borders.[69] It would seem to follow that if the state's power to exact consent to be sued depended on its power to exclude, and it could not exclude, it could not exact such consent.[70] Nonetheless, the Court continued to hold that foreign corporations were subject to the jurisdiction of state courts, even if the business they carried on within the state was interstate commerce.[71]

The major defects in the consent thesis were obvious. The failure of its conceptualism was recognized long before the Supreme Court took official notice of it. In 1855, for example, the New Jersey Supreme Court described the defects of the consent "notion" equally applicable to the "presence" notion. Nonetheless, the consent theory continued to dominate the opinions of the Supreme Court. As late as 1933, the Court was still speaking the pure language of *Bank of Augusta v. Earle* and *St. Claire v. Cox.*[73]

> If a corporation may sue within a foreign jurisdiction, it would seem consistent with sound principle that it should also be liable to be sued within such jurisdiction. The difficulty is this, that process against a corporation must, at common law, be served upon the principal officer of the corporation within the jurisdiction of that sovereignty by which it was created. The rule is founded upon the principle, that the artificial, invisible, and intangible corporate body is exclusively the creature of the law; that it has no existence, except by operation of law, and that, consequently, it has no existence without the limits of that sovereignty, and beyond the operation of those laws by which it was created, and by whose power it exists. The rule rests upon a highly artificial reason, and, however technically just, is confined at this day in its application within exceedingly narrow limits. A corporation may own property, may transact business, may contract debts; it may bring suits, it may use its common seal; nay, it may be sued within a foreign jurisdiction, provided a voluntary appearance is entered to the action. It has then existence, vitality, efficiency, beyond the jurisdiction of the sovereignty which created it, provided it be voluntarily exercised. If it be said that all these acts are performed by agents, as they may be in the case of a private individual, and that the corporation itself is not present, the answer is, that a corporation acts nowhere, except by its officers and agents. It has no tangible existence, except through its officers. For all practical purposes, its existence is as real, as vital, and efficient elsewhere as within the jurisdiction that created it. It may perform every act without the jurisdiction of the sovereignty that created it that it may within it. Its existence anywhere and everywhere is but ideal. It has no actual personal identity and existence as a natural person has, no body which may exist in one place and be served with process while its agents and officers are in another. Process can only be served upon the *officers* of a corporation within its own jurisdiction, not upon the corporation itself.[72]

2. *"Presence"*

The presence doctrine afforded an equally defective pattern, for it necessarily rejected the theme of *Bank of Augusta* and *Paul v. Virginia,* that a corporation cannot exist beyond the limits of the state which created it. From time to time, however, the Supreme Court spoke as though the issue were one of presence rather than consent.[74] Thus, Mr. Justice Brandeis said in *Philadelphia and Reading R.R. v. McKibbin,*[75] "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there."[76] And very distinguished authorities in other courts adopted this approach to the problem.[77] The presence theory, unlike the consent doctrine, would sustain jurisdiction against corporations on claims which did not arise out of the business done within the state,[78] a position which the Supreme Court never openly espoused. On the other hand, under that doctrine, the departure from the state by the corporation by ceasing to do business therein would preclude later assertion of jurisdiction even as to claims which grew out of the business it had once done there.[79] The implied consent theory would sustain jurisdiction under such circumstances.[80]

In the same fashion in which he had removed the mask of the consent theory,[81] Judge Hand exposed the false face of the presence thesis. In *Hutchinson v. Chase and Gilbert,*[82] he wrote for a court made up of three of the most capable judges ever to sit on any American court:

It scarcely advances the argument to say that a corporation must be 'present' in the foreign state, if we define that word as demanding such dealings as will subject it to jurisdiction, for then it does no more than put the question to be answered. Indeed it is doubtful whether it helps much in any event. It is difficult, to us it seems impossible, to impute the idea of locality to a corporation, except by virtue of those acts which realize its purposes. The shareholders, officers and agents are not individually the corporation, and do not carry it with them in all their legal transactions. It is only when engaged upon its affairs that they can be said to represent it, and we can see no qualitative distinction between one part of its doings and another, so they carry out the common plan. If we are to attribute locality to it at all, it must be equally present wherever any part of its work goes on, as much in the little as in the great.

When we say, therefore, that a corporation may be sued only where it is 'present,' we understand that the word is used, not literally, but as shorthand for something else. It might indeed be argued that it must stand suit upon any controversy arising out of legal transactions entered into where the suit was brought, but that would impose upon it too severe a burden. On the other hand, it is not plain that it ought not upon proper notice, to defend suits arising out of foreign transactions, if it conducts a continuous business in the state of the forum. At least the Court of Appeals of New York seems still to suppose this to be true . . . But a single transaction is certainly not enough, whether a substantial business subjects that corporation to jurisdiction generally, or only as to local transactions. There must be some continuous dealings in the state of the forum; enough to demand trial away from its home.

This last appears to us to be really the controlling consideration, expressed shortly by the word 'presence,' but involving an estimate of the inconveniences which would result from requiring it to defend, where it has been sued. We are to inquire whether the extent and continuity of what it has done in the state in question makes it reasonable to bring it before one of its courts. Nor is it anomalous to make the question of jurisdiction depend upon a practical test . . . This does not indeed avoid the uncertainties, for it is as hard to judge what dealings make it just to subject a foreign corporation to local suit, as to say when it is 'present,' but at least it puts the real question, and that is something. In its solution we can do no more than follow the decided cases.[83]

In his conclusion, Judge Hand once again foreshadowed the doctrine which the Supreme Court would later adopt:

In the end there is nothing more to be said than that all the defendant's local activities, taken together, do not make it reasonable to impose such a burden upon it. It is fairer that the plaintiffs should go to Boston than that the defendant should come here. Certainly such a standard is no less vague than any that the courts have hitherto set up; one may look from one end of the decisions to the other and find no vade mecum.[84]

3. *"Doing Business"*

The courts thus came round to using either the consent thesis or the presence thesis, depending largely upon which would support jurisdiction over the nonresident corporation. No notice was taken of the underlying inconsistency between the two doctrines. The application of either doctrine created difficulties, for whichever was chosen it became necessary to determine whether the foreign corporation was "doing business" within the state, either to decide whether its "consent" could properly be "implied," or to discover whether the corporation was "present." The law reports became cluttered with decisions as to what constituted "doing business." The cases drew fine lines which made little sense in terms of either theory. A fair sampling is afforded by Judge Learned Hand in *Hutchinson v. Chase and Gilbert:*

Possibly the maintenance of a regular agency for the solicitation of business will serve without more. The [negative] answer made in Green v. C.B. and Q.R.R. Co., 205 U. S. 530 . . . and People's Tob. Co. v. Amer. Tobacco Co., 246 U. S. 79 . . . perhaps becomes somewhat doubtful in the light of International Harvester Co. v. Kentucky, 234 U. S. 579 . . . and, if it still remains true, it readily yields to slight additions. In Tauza v. Susquehanna Coal Co. . . . there was more, but the business was continuous and substantial. Purchases, though carried on regularly, are not enough (Rosenberg Co. v. Curtis Brown Co., 260 U. S. 516 . . .), nor are the activities of subsidiary corporations (Peterson v. Chicago, R.I. and P. Ry. Co., 205 U. S. 364 . . .; Cannon Mfg. Co. v. Cudahy Packing Co., 267 U. S. 333 . . .), or of connecting carriers (Philadelphia and Read. Co. v. McKibbin, 243 U. S. 264 . . .). The maintenance of an office, though always a make-weight, and enough when accompanied by continuous negotiation, to settle claims (St. Louis S.W. Ry. v. Alexander, 227 U. S. 218 . . .), is not of much significance (Davega, Inc. v. Lincoln Furniture Co., 29 F. (2d) 164 (C.C.A.2). It is quite impossible to establish a rule from the decided cases, we must step from tuft to tuft and across the morass.[85]

The myriad of cases dealing with the question of "doing business" soon substituted that shibboleth for any theory. Without looking back of the words, the courts held that jurisdiction existed if the corporate defendant was "doing business" within the jurisdiction but no jurisdiction existed if it were not "doing business."[86] Even when so broadly defined as in the *Restatement of the Conflict of Laws*[87] it provided no basis for growth, since it offered a conclusion rather than a reason. The only reasons were those implicit in the doctrines of "consent" or "presence" and these were obviously unsatisfactory.

The real difficulty underlying these attempts to work out a rationale for personal jurisdiction lay in the fact that the doctrines were borrowed from laws relating to wholly independent sovereignties and were not relevant to jurisdictions joined in a federation.[88] The basic premise for such decisions was "that a judgment . . . is necessarily something to be enforced and that a state which is physically impotent to enforce its judgments should be treated as legally incompetent to adjudicate."[89] But with the Full Faith and Credit Clause as an overriding principle, such a premise only put the question; it did not answer it.[90]

The real question became not whether a state could itself enforce a judgment, but rather under what circumstances the national power would be used to assist the extra-territorial enforcement of a state's judicial decrees.[91] The great importance of *Pennoyer v. Neff* is that it identified the test under the Full Faith and Credit Clause with the test under the Due Process Clause, making a judgment which would not be enforceable beyond the borders of the state unenforceable within its boundaries. If there are reasons, concerned with the state's relationship with the litigation, why a judgment is not entitled to extrastate enforcement, those reasons are sufficient to sustain attack within the state. Although *Pennoyer* established this principle, there remained the necessity for fixing criteria for determining when the absence of the state's physical power would be supplemented by the command of the national sovereign, criteria which must necessarily change with the basic changes in our methods of carrying on economic activity and with the changes in means of transportation and communication. The attempts to adapt old language to new problems proved unhappy in their result.

With doctrine in so bad a state of disrepair,[92] the time had long since passed for the Supreme Court to acknowledge the truth of Holmes' dictum that "the Constitution is not to be satisfied with a fiction."[93] *International Shoe Co. v. Washington* afforded the Court an opportunity to begin to set its house in order in this field.

II. INTERNATIONAL SHOE CO. v. WASHINGTON[94]

The *International Shoe* case, like *Erie R.R. v. Tompkins*,[95] served rather to destroy existent doctrine than to establish new criteria for the Supreme Court and other courts to follow. Unlike *Erie*, however, it did not purport to overrule the multitude of cases which rested on the earlier doctrinal errors. It is noteworthy primarily for its belated recognition of the fictive nature of the principles of "implied consent" and "presence" and not for the discovery of that *vade mecum* which Judge Learned Hand had found so elusive.[96]

The facts, as Mr. Justic Black pointed out,[97] presented an issue which could have been readily resolved under existent precedent. The defendant was a Delaware corporation with its principal place of business in St. Louis, Missouri, and with additional places of business in several states other than Washington.[98] It had neither offices nor property—except for shoe samples—in Washington. It made no contracts there. It did not deliver the goods in that state, but shipped them f.o.b. from outside the state. It did, however, employ salesmen in Washington to solicit orders there. These salesmen were residents of Washington and their time was fully engaged by the defendant for services to be performed primarily within that state. The salesmen rented display rooms within the state. for the cost of which they were reimbursed by the defendant. Their commissions for the years in question exceeded $31,000 per annum. The record clearly suggests that the method of doing business in Washington was adopted with a view to avoiding both the legislative and judicial power of that state.[99]

On these facts, the state of Washington sought to recover unemployment compensation taxes from International Shoe based on the compensation paid to its salesmen as commissions during the years in question. The amount of taxes involved was approximately $3,600. The Washington Unemployment Compensation Act[100] authorized the issuance of an order and notice of assessment to delinquent taxpayers, to be served on the employer in the same fashion as prescribed by the general service statute, *i.e.*, by personal service on employers found within the state and by registered mail on employers not so found. The statute provides for review of the assessment by appeal within the state administrative body and by further appeals through the courts of Washington on questions of law. The shoe company was served with notice by personal service on one of its salesmen within the state and by registered mail at its St. Louis office. It appeared "specially" to contest the jurisdiction of the state to assess the tax and to contest the in personam jurisdiction of the Washington tribunals. Throughout the state proceedings, the shoe company asserted that the Commerce Clause and the Due Process Clause proscribed the state's legislative jurisdiction and that the Due Process Clause prevented the state from asserting personal jurisdiction over the corporation. After judgment against it in the Supreme Court of Washington,[101] the shoe company appealed to the Supreme Court of the United States, which noted probable jurisdiction,[102] informed counsel that it did not want to hear argument on the Commerce Clause question, and transferred the case to its summary docket.[103]

In its opinion, the Supreme Court quickly disposed of the Commerce Clause question, on the basis of Congressional legislation:

> . . . 53 Stat. 1391, 26 U. S. C. §1606(a) provides that "No person required under State law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the State law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specified ways, to regulate interstate commerce or impose burdens upon it. *Kentucky Whip and Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334; *Perkins v.*

Pennsylvania 314 U. S. 586; *Standard Dredging Co. v. Murphy*, 319 U. S. 306, 308; *Hooven and Allison Co. v. Evatt*, 324 U. S. 652, 104 670; *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 769.

The Court might as easily have disposed of the question of in personam jurisdiction. Washington had laid no claim to a power to exclude International Shoe from carrying on its business within the state, and therefore did not rest on a power to extort the corporation's consent to service. Instead, the Washington court found the defendant to be "present" within the jurisdiction by reason of the business which it carried on there:

> While we are of opinion that the regular and systematic solicitation of orders in this state by appellant's agents, resulting in a continuous flow of appellant's products into this state by means of interstate carrier, is sufficient to constitute doing business in this state so as to make appellant amenable to process of the courts in this state, we are also of the opinion that there are additional activities which bring this case well within the solicitation plus rule.[105]

These additional activities were "the salesmen's display rooms, and the salesmen's residence within the state, continued over a period of years."[106] In reaching its conclusion, the Washington court relied heavily on *Tauza v. Susquehanna Coal Co.*,[107] and Mr. Justice Rutledge's opinion for the Court of Appeals for the District of Columbia in *Frene v. Louisville Cement Co.*,[108] as giving a proper interpretation to *Green v. Chicago, B. and Q. R. R.*[109] which had held that "mere solicitation" was inadequate to sustain personal jurisdiction over a foreign corporation and *International Harvester Co. v. Kentucky*,[110] which had held that "solicitation plus" provided a sufficient base. It was certainly within reason for the Supreme Court of the United States to have adopted the same thesis and dismissed the appeal for want of a substantial federal question on this ground, in reliance on the *Harvester* case, as Mr. Justice Black would have had it do.[111]

Instead, Mr. Chief Justice Stone, for all the participating members of the Court except Mr. Justice Black, wrote an opinion in which he rejected the earlier notions of "presence" and "implied consent" in the same terms as, and in reliance on, Judge Learned Hand's opinions in *Hutchinson v. Chase and Gilbert*[112] and *Smolik v. Philadelphia and Reading R. R.*[113] In their place he offered a doctrine sufficiently amorphous to call forth Mr. Justice's Black's objection on the ground that it might prove unduly restrictive of state judicial power. But after demolishing the "presence" doctrine, in characteristic fashion,[114] Stone proceeded to use that very word in sustaining the jurisdiction of the Washington tribunals.[115] Implicit in the opinion is the position that the Court was not overruling the earlier precedents, but was substituting an appropriate rationale to demonstrate their consistency.

Stone's rationalization was this:

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an *individual* or *corporate defendant* with which the state had *no contacts, ties, or relations* . . .
>
> But to the extent that a *corporation* exercises the *privilege* of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that *privilege* may give rise to obligations, and *so far as those obligations arise out of or are connected with the activities within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.[116]

It is to be noted, too, that however far Stone was traveling from original notions of consent, he continued to use the old language of "privilege." It was in sustaining the jurisdiction of the Washington tribunals over this particular action, that the language of the "fairness" test was utilized. For here there "were sufficient contacts or ties with the state of the forum to make it reasonable and just, according to our traditional conception of fair play and substantial justice, to enforce the obligation which appellant has incurred there."[117] Mr. Justice Johnson's "eternal principles" thus reappeared.

The Court held that service of process was proper whether considered to have been accomplished by the personal service on the corporation's salesman within the state or by the notice mailed to the corporation's home office in St. Louis. In suggesting that service outside of the state without more would suffice, the opinion offered the states an opportunity to dispense with the cumbersome procedure of service on a state official plus extraterritorial notice, the method suggested in *Pennoyer* and utilized extensively by the states since. But otherwise, the Court's conclusions on personal jurisdiction were hardly revolutionary.

Mr. Justice Black, however, thought otherwise. For him the rules were clear. "Certainly a State, at the very least, has power to tax and sue those dealing with its citizens within its boundaries."[118] There is no suggestion that "tax and sue" were joint rather than several, for he went on to assert that states had power "to open the doors of its courts for its citizens to sue corporations whose agents do business in those states."[119] Here there is no limitation on the nature of the suit, no thesis that the suit grow out of the business done within the state, but the proposition is limited to actions by citizens of the state and not outsiders. For him it followed that the "elastic standards" of "fair play," "justice," and "reasonableness"

could not be used as a "measuring rod" of state power, for to do so would be to substitute "notions of 'natural justice'" for the specific mandates of the Constitution. Due process, for him, did not imply such limitations on state power.[120] So long as "proper service can be had" and the corporation is "doing business" in the state, jurisdiction may be exercised by the state's courts, though he did not say where the criteria for "proper service" were to be found, nor whether he was using the phrase "doing business" in the same sense that his predecessors had done so. In considering Mr. Justice Black's position, it should not be forgotten that he was also of the mind that the Due Process Clause afforded no protection to corporations in any event, whatever its content.[121]

The third issue presented to the Court evoked no disagreement. Washington clearly had the right to impose a tax "on the privilege of employing appellant's salesmen within the state measured by a percentage of the wages . . . The right to employ labor had been deemed an appropriate subject of taxation in this country and England, both before and since the adoption of the Constitution."[122]

If the *International Shoe* case was the beginning of a new formulation of doctrine for personal jurisdiction, it contains only a statement of policy, when "what are needed are rules of a fairly definite character . . . policy alone will not suffice [though] any such rules must be firmly based upon considerations of policy."[123] There are several specific rules which might be derived from the Court's judgment in *International Shoe.*

At one point the opinion suggests that the mere fact that the cause of action arose out of activities of the corporation within the state was sufficient to sustain jurisdiction.[124] The grandfather of the *International Shoe* doctrine, Judge Learned Hand, thought that such a rule would "impose . . . too severe a burden."[125] The argument in its favor is that such a rule would provide the forum in terms of the fact that "the law to be applied is local law" and the "facts are local facts."[126]

If not the majority, Mr. Justice Black at least seemed to suggest that the state of the plaintiff's residence was entitled to provide him with a forum. To use Professor Dodd's language once again, certainly the "state of plaintiff's domicile . . . is vitally interested in obtaining justice for its inhabitants . . . and it may be argued that a plaintiff has as much right as a defendant to claim that the legal battle ought to be fought at his home."[127] This factor alone as a basis for jurisdiction would indeed be a startling innovation in Anglo-American jurisprudence. It is more likely to be viewed as a factor which together with some other or others would be sufficient to warrant jurisdiction.

With the state itself as plaintiff, it might be argued that legislative jurisdiction, *i.e.*, the jurisdiction to impose the tax, ought to carry with it the judicial jurisdiction to enforce it. It is possible that the courts of the taxing state might well provide the only forum available, since the Supreme Court, which has said that a judgment secured on a tax claim must be enforced in other states,[128] has not yet said that one state's courts must enforce the tax claims of another state.[129] Certainly if no other forum is available, there is much to be said for allowing this forum to exercise jurisdiction. Even if, however, other courts were prepared to enforce the Washington tax claim,[130] sound argument might be made that one state ought not to be compelled to submit its claims to another state's tribunals for adjudication.

Another important factor to be considered is the extent of the business done by the defendant within the jurisdiction. When the defendant is prepared to spend money, time, and effort extensively within the state, it does not behoove him to complain about the necessity for appearing therein to litigate, and especially is this true where the claim in litigation grows out of the business done therein.

Since the *International Shoe* case involved all these factors, it is not possible to determine whether any one of them or any combination of them short of all would sustain jurisdiction, except insofar as it is clear that those factors which would properly have grounded jurisdiction under the earlier doctrine would probably prove satisfactory under *International Shoe.*

Presumably, however, there are negative factors to be taken into consideration as well, factors which, in other cases, would weaken the effect to be given to those items already listed. Only two appear to have existed in the *International Shoe* case itself, and neither of them seems of great importance. The first is the distance between the defendant's executive offices and the place of trial and the second that defendant's records relevant to the issues here were located in St. Louis.

Whether this sort of analysis of the equities was what was anticipated by the "fairness" doctrine is difficult to ascertain. The Supreme Court's own decisions suggest that a much narrower interpretation might be afforded the *International Shoe* case. At the very same term of court, Mr. Justice Rutledge described its holding as only that "'mere solicitation' where it is regular, continuous and persistent, rather than merely casual constitutes 'doing business' contrary to formerly prevailing notions."[131]

It was to be several years before further light—or darkness—was to be shed by the Supreme Court on the scope of its new doctrine.[132]

III. TRAVELER'S HEALTH ASSOCIATION v. VIRGINIA[133]

The first full-dress opinions to deal with the question of personal jurisdiction after *International Shoe* were rendered in *Traveler's Health Association v. Virginia*. It gave the Court no little trouble, for four months after argument it was ordered reargued and no opinion was forthcoming until seven weeks thereafter. When the case was decided it revealed a thoroughly divided court. The majority opinion was written by Mr. Justice Black. Mr. Justice Douglas wrote a separate concurring opinion, though he also joined in the opinion of the Court. Mr. Justice Minton, who was joined by Mr. Justice Jackson, thought that there was no case or controversy presented for review, and disagreed on the merits as well. Justices Reed and Frankfurter thought the case ripe for adjudication but joined with Minton and Jackson on the merits. The vote on the merits was thus five to four, with one of the five feeling it necessary to file an opinion of his own.

Traveler's was a Nebraska non-profit corporation "having its principal and only office for the transaction of business in Omaha, Nebraska."[134] It had no "office, officer, official, agent, representative, bank account, or any other real or personal property, tangible or intangible, located in the State of Virginia."[135] All applications for membership in the Association were received by mail in Omaha. Members were entitled to health insurance benefits on the payment of regular assessments. All assessments were payable in Omaha; all claims were to be submitted in Omaha, whence payments were made by mail. New members were "usually obtained through recommendations of existing members."[136] Recommended prospects were sent application blanks and returned them by mail to Omaha, where they were acted upon and if approved certificates were sent by mail. At the time of the proceedings, Traveler's had about eight hundred "members" in Virginia.

Virginia law[137] required all those selling certificates of insurance in Virginia to obtain a license from the State Corporation Commission, which license was obtainable only after providing detailed information satisfactory to the Commission and filing a consent to be sued in Virginia courts on claims filed against the licensee, with service of process to be made on the Secretary of the Commonwealth. Traveler's did not have the necessary permit nor had it applied for one.

Proceedings were initiated before the State Corporation Commission by the issuance of an order to show cause why a cease and desist order should not be entered which would restrain Traveler's from advertising for sale and selling certificates of insurance in Virginia, by mail or otherwise.[138] Notice of the entry of the order to show cause was served on Traveler's in Omaha by registered mail. The defendant appeared specially to contest the jurisdiction of the Commission. After a hearing, on stipulated facts, the cease and desist order was entered by the Commission and the Commission was "authorized to give such publicity to the order as it sees fit for the 'information and protection of the public.' (Section 6, Virginia Securities law . . .)."[139] In characterizing its order, the Commission said:

> There is no element of compulsion except such as may flow from a dread of publicity attending such an order. In such cases, the only weapon available to the Commonwealth is to publicly advise that the securities of the respondent do not bear the stamp of the state's approval and are being presented to the public without regard to the regulatory laws enacted to protect them. Section 6 . . . imposes no penalties, exacts no direct toll from those against whom its orders proceed. Its purpose, admittedly limited, is, after a full consideration of facts adduced in support of charges, to call on those found to be violating the provisions of the statute to halt and to fully apprise the public of Virginia that to deal with such violators is to deal at their peril.[140]

It, therefore, went on to rule that no personal jurisdiction over the defendant was necessary to the exercise of its jurisdiction in this matter.

The Supreme Court of Appeals of Virginia affirmed the action of the State Corporation Commission.[141] It held that both legislative and judicial jurisdiction existed by reason of the fact that members of the Association acted in Virginia as agents to secure new members of the Association there; that remittances were received in Virginia; that the membership certificates mailed from Omaha were subject to approval by the certificate holder and thus the contracts were made in Virginia; that the Association investigated claims made by Virginia members which investigations must have taken place in Virginia. It held that its authority over the Association was justified under *International Harvester Co. v. Kentucky* and *International Shoe Co. v. Washington*. It did not suggest that the power of the Commission was limited to publicity, but noted that a penal sanction in the nature of a $500 fine was available against violators of the act, and that penal sanctions might be enforced by extradition.

In the Supreme Court of the United States, the appellant raised two issues. It relied not at all on the Commerce Clause, but asserted that the Due Process Clause protected it against Virginia jurisdiction and that Virginia was barred by the Postal Clause[142] from prohibiting it from making use of the mails. But the postal issue was not dealt with in appellant's brief on the merits and was treated as abandoned.[143]

Despite his dissent in the *International Shoe* case, Mr. Justice Black said:

We hold that Virginia's subjection of this Association to the jurisdiction of that state's Corporation Commission in a §6 proceeding is consistent with *'fair play and substantial justice,'* and is not offensive to the Due Process Clause.[144]

No line of distinction was drawn by the majority between legislative and judicial jurisdiction. Lumping the two as if they were one, the Court said:

In *Osborn v. Ozlin,* 310 U. S. 53, 62, we recognized that a state has a legitimate interest in all insurance policies protecting its residents against risks, an interest which the state can protect even though the 'state action may have repercussions beyond state lines ° ° ° .' And in *Hoopeston Canning Co. v. Cullen,* 318 U. S. 313, 316, we rejected the contention . . . that a state's power to regulate must be determined by a 'conceptualistic discussion of theories of the place of contracting or of performance.' Instead we accorded 'great weight' to the 'consequences' of the contractual obligations in the state where the insured resided and the 'degree of interest' that state had in seeing that those obligations were faithfully carried out. And in *International Shoe Co. v. Washington,* 326 U. S. 310, 316, this Court, after reviewing past cases, concluded: 'due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[145]

Had the opinion said no more than this, a conclusion might be justified in the terms suggested earlier[146] that legislative jurisdiction carries with it the power of the state to enforce its regulatory policy in its own courts. But the Court, anticipating the question which was to come before it at a later time,[147] went on to state:

Moreover, if Virginia is without power to require this Association to accept service of process on the Secretary of the Commonwealth, the only forum for injured certificate holders might be Nebraska. Health benefit claims are seldom so large that Virginia policyholders could afford the expense and trouble of a Nebraska law suit. In addition, suits on alleged losses can be more conveniently tried in Virginia where witnesses would be most likely to live and where claims for losses would presumably be investigated. Such factors have been given great weight in applying the doctrine of forum non conveniens . . . And prior decisions of this Court have referred to the unwisdom, unfairness and injustice of permitting policyholders to seek redress only in some distant state where the insurer is incorporated. The Due Process Clause does not forbid a state to protect its citizens from such injustice.[148]

There can be no doubt that this question was not before the Court and need not have been decided. But Supreme Court dicta, especially in this area, have proved as efficacious as statements which may properly be classified as holdings. And once again we have involved another element which was previously discussed: the relevance of the right of the plaintiff's state to impose judicial jurisdiction on the defendant, especially where it may be said that the claim arises out of business done within the state by the defendant. The conclusion reached by the Court on this issue, in addition to being dicta, however, was inconsistent with the case of *Minnesota Commercial Men's Association v. Benn,*[149] which the Court purported to distinguish rather than to overrule.[150] In the *Benn* case, on which appellant relied very heavily, the Court had said:

. . . we think it cannot be said that the Association was doing business in Montana merely because one or more members, without authority to obligate it, solicited new members. That is not enough 'to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the State or district where service is attempted.' . . .

It also seems sufficiently clear . . . that an insurance corporation is not doing business within a State merely because it insures lives of persons living therein, mails notices addressed to beneficiaries at their homes and pays losses by checks from its home office . . .

We conclude that the record fails to disclose any evidence sufficient to show that petitioner was doing business in Montana within the proper meaning of those words, and that the court there lacked jurisdiction to award the challenged judgment.[151]

Two other items in the Black opinion are noteworthy. First is the analogy to the doctrine of forum non conveniens. The suggestion that the question of jurisdiction over the person and the question of forum non conveniens are the same was one which Judge Learned Hand had also expressed.[152] It would add to the authorities which may provide content for the rule resulting from *International Shoe,* but it hardly would give a sufficiently fixed contour for guidance of future actions, especially since that amorphous doctrine differs from jurisdiction to jurisdiction. More than this, however, it contains the seeds of a proposition that federal courts' in personam jurisdiction may be far more extensive than that of state courts, a proposition which will have to be examined at some other time.[153] The other matter of note is the implication that one of the factors to be taken into consideration is the relative economic abilities of the defendant and plaintiff to underwrite the costs of the lawsuit, probably in terms of the class to which each belongs rather than their individual capacities.

The majority opinion went on to hold that the service by mail was adequate notice, as previously indicated by the *International Shoe* case. And it foreclosed consideration of what powers the State of Virginia might have in the event that the cease and desist order were not obeyed by the Association.

Mr. Justice Douglas' concurring opinion, despite the fact that he also joined the majority opinion, shows a more careful approach to and analysis of the problem presented by the immediate issues of the case. He carefully drew the line between legislative jurisdiction and judicial jurisdiction. On the former he said:

The requirements of due process do not, in my opinion, preclude the extension of Virginia's regulatory scheme to appellant. I put to one side the case where a policyholder seeks to sue the out-of-state company in Virginia. His ability to sue is not necessarily the measure of Virginia's power to regulate . . . It is the nature of the state's action that determines the kind or degree of activity in the state necessary for satisfying the requirements of due process. What is necessary to sustain a tax or to maintain a suit by a creditor . . . is not in my view determinative when the state seeks to regulate solicitation within its borders.[154]

He went on to say that the judicial power of the state may properly be used to enforce its legislative powers:

The requirements of due process may demand more or less minimal contacts than are present here, depending upon what the pinch of the decision is or what it requires of the foreign corporation . . . Where the corporate project entails the use of one or more people in the state for the solicitation of business, in my view it does no violence to the traditional concept of due process to allow the state to provide protective measures governing that solicitation. That is all that is done here.

I cannot agree that this appeal is premature. Virginia has placed an injunction on appellants, an injunction which may have numerous consequences, e.g., contempt proceedings. There is an existing controversy—real and vital to appellants.[155]

Were it not for the last paragraph, it might be inferred that Mr. Justice Douglas was suggesting that administrative jurisdiction might be broader than judicial jurisdiction. But the recognition of the judicial nature of the controversy in the case necessarily rejected such a notion.

The Court being so closely divided, the minority interpretation of the *International Shoe* doctrine is necessarily important to future litigation. Although two members of the minority rested on the Corporation Commission's statement that nothing more was involved here than the power of the state to publicize Traveler's default,[156] and therefore would have held that no judicial issue was presented for decision,[157] all four were in agreement that judicial jurisdiction did not exist in this case. They, too, drew a careful line between legislative jurisdiction and judicial jurisdiction, and apparently were unwilling to draw the conclusion that the existence of the former was sufficient to establish the latter.[158] Nor were they willing to accept the proposition that extraterritorial service alone was sufficient notice to a nonresident defendant.[159] On the issue of judicial power, Mr. Justice Minton, speaking for the entire minority said:

An in personam judgment cannot be based upon service by registered letter on a nonresident corporation or a natural person, neither of whom has ever been within the State of Virginia. *Pennoyer v. Neff* . . .

Service by registered mail is said by the majority to be sufficient where the corporation has 'minimum contacts' with the state of the forum. How many 'contacts' a corporation or person must have before being subjected to suit we are not informed. Here all of appellants' contacts with the residents of Virginia were by mail. No agent of appellant corporation has entered the State, nor has the individual appellant. The contracts were made wholly in Nebraska. Under these circumstances, I would hold that appellants were never 'present' in Virginia.

'For the terms "present" or "presence" are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process.' *International Shoe Co. v. Washington* . . .

As I understand the *International Shoe Co.* Case, the minimum contacts must be 'activities of the corporation's agents within the State.' There were such contacts by agents within the State in that case . . . [160]

The *Traveler's Health* case did little to make specific the criteria necessary to make of *International Shoe* a doctrine which might be applied with some certainty by other courts in the American judicial system. It clearly indicated, however, that the new doctrine would be a broader base for sustaining judicial jurisdiction than had the older doctrines of "presence" and "implied consent."

IV. PERKINS v. BENGUET CONSOLIDATED MINING CO.[161]

The third in the series of important recent Supreme Court decisions involving personal jurisdiction of state courts over nonresident defendants was *Perkins v. Benguet Consolidated Mining Co.* Once again the issue proved a troublesome one. Only six members of the Court were represented by the majority opinion written by Mr. Justice Burton. Mr. Justice Black concurred in the result, which may be read as an objection to some of the language included by the Court in its opinion or to the failure of the opinion to take any notice whatsoever of the arguments in the *Traveler's Health* case. Mr. Justice Minton wrote a dissent, in which he was joined by Mr. Chief Justice Vinson, on the ground that the Supreme Court lacked jurisdiction to entertain the case on the merits.

The *Benguet* case was one of a series of lawsuits which had plagued the courts of many jurisdictions, some so distantly separated as Manila and New York City.[162] The plaintiff was a resident of and presumably a citizen of Connecticut.[163] The defendant was a "sociedad anonima" of the Philippines, which was treated for the purposes of the decision as a corporation created under the laws of that country. The suit was brought in Ohio. Plaintiff's claim was that as a shareholder of the corporation she had been wrongfully denied cash dividends and stock dividends of a value approximating 2.6 million dollars. Although the facts about the operations of the corporation in the state of Ohio were disputed,[164] both the Supreme Court and the Ohio courts relied on the following as a basis for their decisions:

The company's mining properties were in the Philippine Islands. Its operations there were completely halted during the occupation of the Islands by the Japanese. During the interim the president, who was also the general manager and principal stockholder of the company, returned to his home in Clermont County, Ohio. There he maintained an office in which he conducted his personal affairs and did many things on behalf of the company. He kept there office files of the company. He carried on there correspondence relating to the business of the company and its employees. He drew and distributed there salary checks on behalf of the company, both in his own favor as president and in favor of two company secretaries who worked there with him. He used and maintained in Clermont County, Ohio, two active bank accounts carrying substantial balances of company funds. A bank in Hamilton County, Ohio, acted as transfer agent for the stock of the company. Several directors' meetings were held at his office or home in Clermont County. From that office he supervised policies dealing with the rehabilitation of the corporation's properties in the Philippines and he dispatched funds to cover purchases of machinery for such rehabilitation. Thus he carried on in Ohio a continuous and systematic supervision of the necessarily limited wartime activities of the company. He there discharged his duties as president and general manager, both during the occupation of the company's properties by the Japanese and immediately thereafter. While no mining properties in Ohio were owned or operated by the company, many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons.[165]

As indicated, service of process on the corporation was made in Ohio by service on its president and general manager.

The defendant appeared specially in the Ohio Court of Common Pleas, where the action was initiated, to quash service of summons. The motion was granted:

. . . on the grounds that (1) defendant is a foreign corporation and, therefore, cannot be served with the summons in accordance with the provisions of the Ohio statutes with reference to service on a partnership, and (2) the business done by the defendant in Ohio was insufficient to legally authorize service of process upon defendant in Ohio.[166]

The orders of dismissal were affirmed by the Ohio Court of Appeals[167] which was in turn affirmed by the Supreme Court of that state.[168]

At the threshold of this case, as in *Traveler's Health*, it became necessary for the Supreme Court of the United States to resolve a question of its own jurisdiction, for the decision of the Ohio Supreme Court was in the form of syllabi, none of which purported to rest decision on the Fourteenth Amendment. If the decision of the Ohio court rested on adequate, independent state grounds, there was no basis for the jurisdiction of the United States Supreme Court.[169] Ordinarily, where it appears that the state court judgment might have rested on an adequate state ground, the Supreme Court has refused to review the case.[170] Occasionally, under such circumstances, the Supreme Court had remanded or continued the case in order to obtain from the state court a clarification of its basis for decision.[171] In the instant case, the Court, over the dissents of Vinson and Minton, chose to violate its position on rendering decisions which might be purely advisory:

The only opinion accompanying the syllabus of the court below places the concurrence of its author unequivocally upon the ground that the Due Process Clause of the Fourteenth Amendment *prohibits* the Ohio courts from exercising jurisdiction over the respondent corporation in this proceeding. That opinion is an official part of the report of the case. The report, however, does not disclose to what extent, if any, the other members of the court may have shared the view expressed in that opinion. Accordingly, for us to allow the judgment to stand as it is would risk an affirmance of a decision which might have been decided differently if the court below had felt free, under our decisions, to do so.[172]

It was undoubtedly true that Mr. Justice Taft of the Ohio Supreme Court rested his opinion on an interpretation of *International Shoe* which was patently erroneous.[173] He believed that *International Shoe* had held *Tauza v. Susquehanna Coal Co.* to be in error in allowing in personam jurisdiction to attach where the cause of action did not arise out of the business done by the defendant corporation within the state. But there was no indication that any of the other six justices of that court agreed with this conclusion.

The opinion of the Supreme Court in the *Benguet* case may reflect nothing more than a specific approval of the *Tauza* rule:

. . . if the . . . corporation carries on . . . continuous and systematic corporate activites as it did here—consisting of directors' meetings, business correspondence, banking, stock transfers, payment of salaries, purchasing of machinery, etc.—those activities are enough to make it fair and reasonable to subject that corporation to proceedings *in personam* in that state, at least insofar as the proceedings *in personam* seek to enforce causes of action relating to those very activities or to other activities of the corporation within the state.

The instant case takes us one step further to a proceeding *in personam* to enforce a cause of action not arising out of the corporation's activities in the state of the forum. Using the tests mentioned above we find no requirement of federal due process that either *prohibits* Ohio from opening its courts to the cause of action here presented or *compels* Ohio to do so. This conforms to the realistic reasoning in *International Shoe* . . .[174]

The necessity for stating that Due Process did not compel the Ohio courts to take jurisdiction was in response to an argument of petitioner, who urged discrimination as a ground for reversal which might have rested better on the Equal Protection Clause.

By way of dictum, a form of indulgence which seems to be practiced by the Court with uncommon regularity in cases involving questions of in personam jurisdic-

tion, the opinion suggested that the mere presence of a corporate official within the state on business of the corporation would suffice to create jurisdiction if the claim arose out of that business and if service were made on him within the state.[175]

Two other factors were present in this case which might well have called forth comment from the Court. In the *Traveler's* case, Mr. Justice Black had hinted that the possibility of suit by way of a quasi-in-rem action within the state, because of the existence there of property of the defendant, tangible or intangible, would suffice as a basis for asserting in personam jurisdiction.[176] Such a position would directly overrule the holding in *Pennoyer v. Neff*[177] and. aside from the Black dictum, there is no reason to suppose that the Court is yet prepared to take such a step. The other factor is one suggested but not eclucidated by petitioner's brief: whether an alternative forum existed for the assertion of the plaintiff's claim. It has already been suggested that the absence of another appropriate forum is a proper factor to consider, at least in terms of a state's own action under its legislative jurisdiction. It would have been starkly presented here if the Philippines were still occupied by enemy forces at the time the action was instituted, for in that event there might be no other forum available to plaintiff. Since the Philippine courts were open, however, the petitioner's suggestion was rather that because the Philippine Court was a foreign tribunal, there was an absence of an adequate alternative forum.[178] Strangely enough this suggestion, which properly derives from the doctrine of *forum non conveniens*,[179] was offered by the petitioner as an argument for the proposition that the Ohio courts should be prevented from elevating the doctrine of *forum non conveniens* to a constitutional status. Again, however, it points up the possibility, already suggested,[180] of a close identity of the *International Shoe* doctrine with the doctrine of *forum non conveniens*.

In the 1952 Term, a case came to the Court, not from a state court, but from the Court of Appeals for the Fifth Circuit in which the majority of the Court refused to deal with any issue of in personam jurisdiction, over the vehement dissent of Mr. Justice Black, speaking for himself and for Mr. Justice Jackson. In *Polizzi v. Cowles Magazines, Inc.*,[181] the petitioner had sued the respondent in the state courts of Florida for an alleged libel. The plaintiff lived in Florida. The defendant was an Iowa corporation. The allegedly libelous materials appeared in *Look* magazine, a publication with wide national circulation, including Florida. The defendant maintained no offices in Florida. It sold its magazines to two wholesalers for distribution throughout the state. (Presumably, it delivered magazines by mail to its subscribers in Florida.) The only employees of the defendant who entered the state were two "circulation roadmen" whose job it was to visit retail outlets to encourage and check on retail sales. These men worked a multi-state area which included Florida.

The defendant corporation removed the action to the federal district court on the ground of diversity of citizenship. After the removal, service of process was made on one of the "circulation roadmen." In the state action, service had been made on an agent of one of the distributors. In the federal court, the defendant "moved the court 'to dimiss the action or in lieu thereof to quash the return of purported or attempted service of the additional summons . . .' ."[182]

Although the section patently deals with matters of venue,[183] the district court "dismissed the action on the ground that it did 'not have jurisdiction under Section 1391, sub-section C, New Title 28, United States Code' because Respondent 'was not, at the time of the service of the summons doing business in [the Southern District of Florida].'" The Fifth Circuit affirmed on the same ground.[184] Mr. Justice Minton, writing for himself, Mr. Chief Justice Vinson and Justices Reed and Clark, a majority of the Court,[185] held that in an action removed to the federal court from the state court, the governing venue provisions were contained in §1441(a)[186] and not in §1391(a). For that reason, venue was proper and the courts below had erred in dismissing the action under §1391(c). The Court refused to pass on the question of personal jurisdiction, saying that it had not been decided by the two lower courts and had been specifically renounced as an issue by both petitioner and respondent.[187] It remanded the case to the district court for a determination of the question whether that court had acquired jurisdiction over the defendant "by proper service."[188]

On the majority's construction of respondent's motion in the trial court, no question of personal jurisdiction need have been litigated on the remand. The defendant having moved—according to the majority's construction—for dismissal for improper venue and to quash service of the summons, defendant was precluded from thereafter raising the issue of in personam jurisdiction.[189] The question which was remanded to the trial court was rather whether the person served by plaintiff was such an agent as would be likely to inform the defendant of the service. That is, the question was one of adequacy of notice and not one of jurisdiction over the person. The distinction had been carefully drawn by Mr. Chief Justice Stone in the *International Shoe* case.

Mr. Justice Black read the record very differently. First, he assumed that the issue of in personam jurisdiction over the defendant was raised by the defend-

ant's motion in the trial court and resolved by the two lower federal courts adversely to the plaintiff. Second, he assumed that the issue of in personam jurisdiction—in terms of "doing business"—would be open on the remand of the case to the trial court. He indicated quite clearly that he was prepared to resolve the question of in personam jurisdiction in favor of the plaintiff. And he did so in rather strident terms. He had, by this time, apparently become enamored of the *International Shoe* doctrines which he had originally rejected so forcefully: "Whether cases are to be tried in one locality or another is now to be tested by basic principles of fairness, unless, as seems possible, this case represents a throwback to what I consider less enlightened practices."[190] Then, merging the questions of adequacy of service with the question of jurisdiction over the person, he found it "ludicrous" that any such question should be considered after three years of litigation.

The more interesting portion of his opinion, however, is concerned not with the in personam jurisdiction of state courts but rather with that of the federal courts. It contains the suggestion similar to that which he had put forth in *Traveler's Health*, that the new federal forum non conveniens statute[191] resolved all problems of this sort for federal courts. Since the defendant had not denied that it could be sued in some court, the case should be remanded to the federal district court "unless Cowles can show that court that it would be in the interest of justice to try the case in another district."[192] The failure of the Court so to use the new statute was labelled by Black as a refusal "to discard old outdated concepts for the new rule of convenience and fairness."[193] The interesting content of this suggestion is threefold: first there is the previously suggested analogue between the standards of forum non conveniens and those of the Due Process Clause for personal jurisdiction; second is the rejection of the notion that the jurisdiction of the district court in removal actions is derivative and thus dependent upon the jurisdiction of the state court; and third that a federal district court's in personam jurisdiction is nationwide, since any defect could be cured by transfer to the appropriate district.[194] There is no suggestion in other Supreme Court opinions that so radical a change is likely to come about. There is certainly nothing in the legislative history of §1404(a) to suggest that it was intended to accomplish so broad a revision of in personam jurisdiction.[195] Indeed, there is nothing in that history to suggest that it intended any changes whatsoever in matters of in personam jurisdiction.

Mr. Justice Burton wrote a short, calm opinion reaching the same conclusion as Mr. Justice Black, that the majority should have ruled on the question of in personam jurisdiction. But unlike Black he found in the majority's opinion no animadversions on the *International Shoe* rule or any suggestion that the case could not be tried in the district court for want of in personam jurisdiction.

V. *McGEE v. INTERNATIONAL LIFE INSURANCE CO.*[196]

The fourth Supreme Court case in this series was the first of two decided during the 1957 Term of Court: *McGee v. International Life Insurance Co.* Like the cases on in personam jurisdiction which immediately preceded it, the case presented the Court with a serious question of its own jurisdiction. The Court overcame that difficulty this time, however, by ignoring it and was able to produce an opinion in which all the participating members of the Court could join.[197]

The facts were not in contest. In April, 1944, the petitioner's son, Franklin, took out an insurance policy on his life with the Empire Mutual Insurance Company, described by the Court as an Arizona corporation. The policy called for payment of $5,000 in the event of the accidental death of the insured and for specified benefits for loss of time during illness.[198] It also provided specifically that no payments would be made in the event of death by suicide.[199] Premiums were to be paid at the rate of one dollar per month.[200] The policy also provided that it should be deemed to have been made in Phoenix and that any liability thereon should be deemed to arise there.[201] In 1948, the respondent, a Texas corporation undertook to assume Empire Mutual's insurance obligations and issued a reinsurance certificate by mail to Franklin in California after he acquiesced in the substitution. The new agreement called for the same terms as its predecessor, except that Austin, Texas was substituted for Phoenix, Arizona as the place of "making" and the place where liability should be deemed to arise.[202] Thereafter, respondent mailed premium notices to Franklin in California who, in turn, mailed his premium payments to respondent in Texas. Franklin died in 1950. Petitioner, the beneficiary under the policy, presented her claim by mail. It was rejected on the ground that death had occurred by suicide.[203]

Petitioner then filed suit in California and made service on respondent only by mail, in accordance with the California Unauthorized Insurers' Process Act.[204] The respondent did not appear and a default judgment was entered against it.[205] Unable to execute on the judgment in California, however, petitioner brought suit on the judgment in Texas. Both the trial court and the Texas Court of Civil Appeals denied relief on the ground that the California judgment violated the Due Process Clause.[206]

Mr. Justice Black wrote the opinion for the Court.

At the outset he stated: "It is not controverted that if the California court properly exercised jurisdiction over respondent the Texas courts erred in refusing to give its judgment full faith and credit."[207] Indeed, it was not controverted, for the ample reason that no issue of full faith and credit had been raised by the petition for certiorari or in petitioner's brief on the merits or, so far as the record reveals, in the Texas courts. Nor was there any indication whatsoever in the opinion of the Texas court that it passed on any such question. Thus, no federal ground *for enforcement of the California judgment* was in issue and in its absence the Supreme Court of the United States lacked jurisdiction to entertain the case.[208]

Ignoring the jurisdictional defect, the Court acknowledged "that neither Empire Mutual nor respondent has ever had any office or agent in California. And so far as the record before us shows, respondent has never solicited nor done any insurance business in California apart from the policy involved here."[209] Thus, the connection of the law suit with California was more tenuous than any in which the Supreme Court had ever sustained jurisdiction over an absent defendant. In the opinion, Mr. Justice Black once again reverted to the language of *International Shoe* which he had at first considered anathema. And he found that jurisdiction properly attached in the California court.[210] He placed specific emphasis on the propriety of jurisdiction where the defendant is called on "to defend himself in a State where he engaged in economic activity,"[211] apparently however slight that engagement might be:

> It is sufficient for purposes of due process that the suit was based on a contract which had a substantial connection with that State . . . The contract was delivered in California, the premiums were mailed there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims.[212]

He also reverted to the proposition that an insured was not in a position to bear the cost of litigation away from home so well as the insurer and to the fact that the evidence necessary to the resolution of the contest was to be found in California. The latter must be weighed more heavily than the former since, under the circumstances of a case such as this, the insured or beneficiary will be forced, even if he secures a judgment, to take it elsewhere in order to enforce it.

The opinion does not suggest that California was an appropriate forum because in part the subject of the insurance policy was located there and was given the protection that California laws and facilities afforded. If the citation of *Zacharakis v. Bunker Hill Mutual Ins. Co.*[213] by the Court was meant as an indication of approval, however, the presence of the subject of the insurance within the state was not a necessary factor. There suit had been brought in New York pursuant to a statute similar to the one involved in the *McGee* case. The insurance was secured by an agent of the insured by a telephone call to the defendant insurance company in Philadelphia. The subject of the insurance was property located in New Hampshire. The insured, however, lived in New York, the policy was mailed to New York from Philadelphia, and premiums were mailed from New York to Philadelphia. These factors, said the New York court, partially in reliance on *Traveler's Health,* were sufficient ties with New York to warrant the exercise of jurisdiction there over the Pennsylvania corporation in a suit on the policy.

If it did nothing more, *McGee* disposed finally of the *Benn* case,[214] which had been cited with approval in *International Shoe,*[215] and distinguished in *Traveler's Health.*[216] Although relied upon by the respondent in *McGee,* it went to its death unnoticed in the Court's opinion. Equally irrelevant, so far as the Court was concerned, were the terms of the contract specifying the "place" of the "making" and "liability."

The importance of the commercial element noted in the opinion is underlined by a decision of the Court at the previous Term which also had been written by Mr. Justice Black. In *Vanderbilt v. Vanderbilt,*[217] the Court was asked to decide whether Nevada which had jurisdiction over the husband, who was domiciled there, could render a judgment binding on the wife, who had been served in New York, which judgment would foreclose her rights to alimony. There was no question but that under the decisions of the Court, the wife's relation to the State of Nevada was adequate under the circumstances to warrant the Nevada court's power to end the marital status of the parties. Nonetheless, the Court held Nevada without authority to enter a personal judgment against the wife foreclosing her claims for support:

> It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. Here, the Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction. Therefore, the Nevada decree, to the extent it purported to affect the wife's right to support, was void . . . [218]

There is no discussion of why the wife was not subject to the jurisdiction of the Nevada court under the circumstances. It is true that the result in this case is perfectly consistent with earlier decisions of the Court.[219] But no reason is offered why the rigid doctrines of *Pennoyer* have been modified in all other

areas by *International Shoe* but not in this one.[220] It is indeed difficult to distinguish *McGee* from *Vanderbilt,* in terms of the defendant's connection with the forum, except on the ground that International Life's relationships with California grew out of its "economic activity." A second possibility exists, that the expansion of the jurisdiction of the state courts was to be limited to cases in which the defendant is a foreign corporation. But this would seem to be rebutted by Mr. Justice Black's own language in *McGee:* "Looking back over the long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents."[221] To say that the commercial element is an important one is not, of course, to suggest that it is a *sine qua non* to a state's jurisdiction over nonresident defendants, as the nonresident motorist statutes, from which the new doctrine springs, clearly demonstrate.

The only other issue in the *McGee* case was quickly disposed of. The fact that the statute was not applicable until after the contract between Franklin and the insurance company had been consummated did not bar its application in this case: "The statute was remedial, in the first sense of that term, and neither enlarged nor impaired respondent's substantive rights or obligations under the contract. It did nothing more than provide petitioner with a California forum to enforce whatever substantive rights she might have against respondent."[222]

From *International Shoe* to *International Life,* the Supreme Court had evolved a doctrine of non-interference with the exercise of jurisdiction over nonresident defendants by state courts. By use of the "fairness" test, suggested by Mr. Chief Justice Stone in derivation from Judge Learned Hand, the Court had made the question of the propriety of such personal jurisdiction a matter of fact which, for all practical purposes, was not reviewable in the Supreme Court. With the exception of the single area of alimony decrees, no limitation on state action of this form had been derived from the Due Process Clause during that time. But the very Term in which *International Life* was decided the Court rendered another decision which, unless it proves to be a sport, forebodes some shift in the Court's approach to these problems.

VI. HANSON v. DENCKLA[223]

The unusual unanimity displayed in the *International Life* case proved to be illusory. *Hanson v. Denckla*[224] and *Lewis v. Hanson*[225] were written by the Chief Justice for a bare majority of five. Mr. Justice Black, the author of the *International Life* opinion, dissented on behalf of himself and Justices Burton and Brennan. Mr. Justice Douglas offered a dissent of his own.

The facts, though not in dispute, were complicated, not the less for the reason that the contest was conducted in two separate states at the same time, arriving at the Supreme Court by different routes: the *Denckla* case came by appeal from the Supreme Court of Florida and the *Lewis* case on certiorari to the Supreme Court of Delaware. The controversy involved a family dispute over the distribution of $400,000, part of an estate left by the testatrix-settlor, Dora Browning Donner.

In 1935, Mrs. Donner, then a domiciliary of Pennsylvania, purported to create a trust for which the Wilmington Trust Company, a Delaware corporation, was named trustee. Mrs. Donner reserved a life estate in herself and retained the power to appoint the remainder, either by testamentary disposition or by inter vivos instrument. She also retained the right to alter, amend, or revoke the trust and the right to change the trustee. In addition, the trustee's powers over the trust property were restricted by the requirement that before it sell or buy securities or engage in certain other specified activities it must first secure the approval of an "advisor" to be appointed by the settlor.

Shortly after executing the trust in 1935, Mrs. Donner exercised her power of appointment. In 1939, the power of appointment was revised. In 1944, she established her domicile in Florida where she remained until her death in 1952. In 1949, while in Florida, she executed a new will and a new power of appointment under the trust. There was no question but that the execution of the power of appointment did not satisfy the formalities necessary for a testamentary disposition under Florida law. The issue presented by the litigation was whether the property should pass pursuant to the terms of the power of appointment or in accordance with the residuary clause of the will. This, in turn, depended upon whether the reservation of powers over the trust assets by the settlor made the trust illusory. In both Florida and Delaware this was considered a question of "first impression."[226] Under the power of appointment, the assets of the trust would pass to two trusts for the benefit of two of Mrs. Donner's grandchildren, Donner Hanson and Joseph Donner Winsor. The trustee of these trusts, which were already in existence, was the Delaware Trust Company, a Delaware corporation. Under the will, the $400,000 in issue would go to trusts for the benefit of two of Mrs. Donner's daughters, Katherine N. R. Denckla and Dorothy B. R. Stewart.

Upon Mrs. Donner's death in 1952, the Wilmington Trust Company transferred the assets in the 1935 trust to the Delaware Trust Company as trustee for Donner Hanson and Joseph Donner Winsor. Fourteen

months after the death of Mrs. Donner, Mrs. Denckla and Mrs. Stewart, the latter through her guardian, initiated a proceeding in the Florida courts for a declaratory judgment "to determine the question of what portion of the trust property involved herein passes under the residuary clause of the will of the decedent."[227] The will had been probated in Florida. Elizabeth Donner Hanson, a daughter of Mrs. Donner and mother of Donner Hanson and Joseph Donner Winsor, had been appointed executrix under the will.[228] In the declaratory judgment action, personal jurisdiction was secured over Mrs. Hanson, Donner Hanson and Joseph Donner Winsor, and over William Donner Roosevelt and Curtis Winsor, Jr., who were also children of Mrs. Hanson and contingent beneficiaries of the Delaware trusts for their brothers. All of these were domiciliaries of Florida and service was made on them there. Neither the Wilmington Trust Company nor the Delaware Trust Company were served with process in Florida,[229] but a copy of "Notice to Appear and Defend" together with a copy of the complaint were mailed to each of them, by ordinary mail, and notice was published in a Palm Beach newspaper, pursuant to Florida law.[230] Neither of the trust companies appeared in the Florida litigation or participated in any way.[231]

Mrs. Hanson and her children, as to whom the Florida court undoubtedly secured personal jurisdiction, moved to dismiss the suit on the ground that the nonresident defendants were indispensable parties over whom the Florida court had failed to secure personal jurisdiction.[232] This, of course, was a question of state law. On this base, the resident defendants also raised a constitutional claim, asserting that an exercise of jurisdiction over the nonresident defendants would be a violation of the Due Process Clause of the Fourteenth Amendment.[233] They did not suggest that the exercise of such jurisdiction would deprive the resident defendants of any constitutional rights. The Florida chancellor dismissed the action as to the nonresident defendants for want of personal jurisdiction,[234] but retained jurisdiction over the resident defendants. He held, as to the latter, that the attempted exercise of the power of appointment was a testamentary disposition which did not satisfy the requirements of Florida law.[235] His conclusion, therefore, was that the $400,000 passed pursuant to the will and should go to the Denckla and Stewart trusts.[236]

After the initiation of the Florida proceedings but prior to the decree, Mrs. Hanson and her children initiated a suit in Delaware for a declaratory judgment as to which parties were entitled to the proceeds of the 1935 trust. All the parties to the Florida suit, except Mrs. Denckla, appeared in the Delaware action.[237] The Florida court then enjoined Mrs. Hanson from proceeding with the Delaware action, but it was carried forward by the other parties. After the Florida decree was entered by the trial court, it was offered as a ground for res adjudicata in Delaware. But the plea was rejected and the Delaware chancellor ruled that the trust was a valid trust under Delaware law and that the power of appointment had been properly exercised to pass the trust assets to the trusts in favor of Mrs. Hanson's children.[238] The prevailing parties in the Florida suit then urged, on a motion for a new trial in Delaware, that the Florida decree was entitled to full faith and credit in Delaware. The motion was denied. The executrix, Mrs. Hanson, then moved the Florida Supreme Court for an order remanding the case to the Florida trial court with orders to dismiss the Florida action on the basis of the Delaware judgment. She did not urge that the Florida court was compelled to abide by the Delaware decree under the Full Faith and Credit Clause. The motion was denied.[239]

On appeal, the Florida Supreme Court sustained the trial court's determination that the trust was invalid, that the power of appointment was invalid, and that the property passed pursuant to the terms of the will.[240] But it reversed the trial court on the jurisdictional issue and held that the Florida courts could properly exercise in personam jurisdiction over the Delaware corporations.[241] The Full Faith and Credit Clause was raised by Mrs. Hanson for the first time on a petition for rehearing[242] which was denied without comment by the Florida Supreme Court.[243]

Thereafter, on appeal, the Supreme Court of Delaware sustained the result reached by its trial court and rejected the contention that it was bound to comply with the Florida decree by reason of the Full Faith and Credit Clause.[244]

Thus, these inconsistent opinions of the highest courts of two sovereign states of the Union were brought to the Supreme Court of the United States for resolution.

On the appeal from the Florida judgment, the Supreme Court properly refused to consider the question whether Florida had to give full faith and credit to the Delaware judgment, inasmuch as that issue had not been timely raised in the Florida courts.[245] The Supreme Court also held that since the appellants had not contended that the Florida jurisdictional statute had been unconstitutionally applied, but only that the Florida courts had improperly exercised in personam jurisdiction, they had failed to raise a question which was a proper subject for an appeal.[246] The Court, therefore, dismissed the appeal, but treating the appeal papers as a petition for certiorari, as required by statute, certiorari was granted.[247] This left but one question for consideration on the Florida appeal: were

the nonresident defendants properly subjected to the jurisdiction of the Florida courts. This in turn depended upon whether the resident defendants, who were properly the subject of Florida judicial jurisdiction,[248] could assert the constitutional defect as to the nonresident defendants who had never appeared or participated in that litigation at all.

The Supreme Court had, theretofore, on numerous occasions held that where Supreme Court review of the decision of a state court was sought, the party seeking review "must show that enforcement of the challenged judgment would deprive it—not another—of some rights arising under the Constitution or laws of the United States."[249] In this instance, however, the Court held that the resident defendants had standing to raise the question because if the nonresidents were not subject to the jurisdiction of the Florida courts, there would be, according to Florida law, an absence of indispensable parties, and the action could not go to judgment. The Court thus shifted the test from whether the resident defendants were asserting a constitutional right of their own to whether a holding of want of jurisdiction over other defendants would affect the judgment entered against the resident defendants.[250] The suggested test put the Supreme Court in a very difficult position. The judgment of want of jurisdiction over the nonresident defendants would affect the judgment against the resident defendants only if the nonresidents were indispensable parties according to Florida law. The Court undertook to resolve that question of state law for itself.[251] It decided that the nonresident trustees were indispensable parties under Florida law although the Florida trial court had necessarily held to the contrary in the judgment it rendered in this very litigation[252] and although the Florida Supreme Court had announced the question as an open one.[253] Mr. Justice Black's suggestion that the case be remanded to the Florida courts for the resolution of this question of state law[254] was rejected, though the Supreme Court has, in recent years, frequently if not consistently refused to indulge the privilege of telling the state courts what the state law should be, especially where, as here, one construction of the state law leads to the necessity for deciding a constitutional question and another construction would avoid it.[255]

On the doubtful assumption that the Due Process question was properly raised, the Court first addressed itself to the question whether the Florida judgment could be sustained on the basis of in rem jurisdiction. To put that question, however, was to continue to use a fiction which necessarily hinders rather than helps to formulate an appropriate body of doctrine to guide the courts in determining whether a given forum is an appropriate one for the determination of the legal and factual issues which are presented by a law suit. The nature of the fiction was long ago revealed by Mr. Justice Holmes, among others:

> All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends on the number of persons affected. Hence the res need not be personified and make a party defendant, as happens with the ship in admiralty; it need not even be a tangible thing at all, as sufficiently appears by the case of the probate of wills. Personification and naming the res as defendants are mere symbols, not the essential matter. They are fictions, conveniently expressing the nature of the process and the result, nothing more.[256]

However true it may be that the situs of property should be a factor in the determination of the appropriate forum for the trial of an action relating to that property, it ought not to be the exclusive factor.[257] To speak in terms of in rem jurisdiction was a reversion to the concept that a court must have physical power to effectuate its judgment, a concept which contravenes the very principles of the Full Faith and Credit Clause[258] and which rejects the notions underlying the broadening of jurisdiction over the person which was reflected in the Supreme Court's decisions from *International Shoe to International Life*.[259] In the *Denckla* case, the Supreme Court said that a court's in rem jurisdiction "is limited by the extent of its power and by the coordinate authority of sister states."[260] But it did not suggest any reason why this should be more or less true of in rem jurisdiction than of in personam jurisdiction. In either event the proper test must relate to whether the forum is an appropriate one for resolving the controversy before it, whatever the rubric attached to the law suit. On the ground that there was "nothing in the record . . . sufficient to establish a situs in Florida"[261] for the trust res, the Court held that there was no in rem jurisdiction in the Florida courts. Strangely enough, however, in discussing whether some other in rem concepts would be available to establish jurisdiction in the Florida courts, the Supreme Court returned to the appropriate question of the relation of the forum to the controversy:

> The Florida court held that the presence of the subject property was not essential to its jurisdiction. Authority over the probate and construction of its domiciliary's will, under which the assets might pass, was though sufficient to confer the requisite jurisdiction. But jurisdiction cannot be predicated upon the contingent role of the Florida will. Whatever the efficacy of a so-called "*in rem*" jurisdiction over assets admittedly passing under a local will, a State acquires no *in rem* jurisdiction to adjudicate the validity of *inter vivos* dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the State nor the decedent could

claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction *in rem* the maxim that personalty has its situs at the domicile of the owner is a fiction of limited utility . . . The maxim is no less suspect when the domicile is that of a decedent. In analogous cases, this Court has rejected the suggestion that the probate decree of the State where decedent was domiciled, has an *in rem* effect on personalty outside the forum State that could render it conclusive on the interests of nonresidents over whom there was no personal jurisdiction . . . The fact that the owner is or was domiciled within the forum State is not sufficient affiliation with the property upon which to base jurisdiction *in rem.*

In fact, the in rem argument was something of a straw man; it had not been strongly urged by the appellants and neither of the dissenting opinions chose to rest on this outmoded notion. So far as the Florida probate proceedings were concerned, it was Mr. Justice Black's view that they were relevant factors in deciding the appropriateness of the Florida forum to determine the litigation in question, but he did not purport to accept the thesis that the estate was a res over which the state had power sufficient to affect the interests of nonresident defendants.[263] Mr. Justice Douglas' approving reference[264] to Mr. Justice Traynor's opinion for the California Supreme Court in *Atkinson v. Superior Court*[265] would seem to imply adoption of the result rather than the means of achieving it, which had been by way of an ingeniously contrived doctrine of quasi-in-rem jurisdiction.[266]

On the question of in personam jurisdiction, both the majority and the Black minority expressed concurrence—if with somewhat different emphasis—in the proposition that the states were not authorized to exercise nationwide in personam jurisdiction. The Chief Justice asserted that "it is a mistake to assume that this trend heralds eventual demise of all restrictions on the personal jurisdiction of state courts. See *Vanderbilt v. Vanderbilt* . . ."[267] The author of the *Vanderbilt* opinion, Mr. Justice Black, said: "Of course we have not reached the point where state boundaries are without significance and I do not mean to suggest such a view here. There is no need to do so."[268]

These two groups were united on another point, that jurisdiction over defendants does not flow as a necessary concommitant of jurisdiction to apply local law to the controversy. But again the emphasis was different. The Chief Justice acknowledge that Florida could apply its own law to the question of the validity of the trust on the ground that the execution of the power of appointment took place there. "For choice-of-law purposes such a ruling may be justified, but we think it an insubstantial connection with the trust agreement for purposes of determining the question of personal jurisdiction over a nonresident defendant."[269] Mr. Justice Black thought the choice of law principles relevant if not controlling on the question of personal jurisdiction: "True, the question whether the law of a state can be applied to a transaction is different from the question whether the courts of that State have jurisdiction to enter a judgment, but the two are often closely related and to a substantial degree depend upon similar considerations.[270] Under the circumstances presented by the case, if the issue were characterized as one of the validity of the trust, Delaware law would seem to be the most appropriate law to be applied.[271] A characterization of the problem as one of the validity of the exercise of the power of appointment would seem to warrant the application of Florida law.[272] One of the major differences between the majority and minority derives from the difference in the way each characterizes the problem, with Warren choosing the first and Black the second.[273]

These differences in emphasis reveal the essential conflict between the majority and minority in their construction of the "minimal" contacts test which both purport to derive from *International Shoe.* Warren specifically rejects the notion of a parallel between forum non conveniens and the appropriate forum under Due Process Clause: a state court "does not acquire jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation."[274] and, more fully:

> Those restrictions [on in personam jurisdiction] are more than a guarantee of immunity from inconvenient or distant litigation. They are consequences of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are prerequisite to its exercise of power over him . . . [275]

Thus, for Warren and the majority, the test was whether there were sufficient contacts between the nonresident defendants and Florida to warrant Florida to impose its judicial power on them:

> The unilateral activity of those who claim some relationship with the nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. . . . The settlor's execution in Florida of her power of appointment cannot remedy the absence of such an act in this case.[276]

For Black and his group, on the other hand, the primary test was not the sufficiency of contacts between the nonresident defendant and the state of the forum, but rather the sufficiency of the relationship of the subject of the litigation to the state of the forum, a

sort of combination of the principles of choice of law with those of forum non conveniens:

> It seems to me that where a transaction has as much relationship to a State as Mrs. Donner's appointment had to Florida its courts ought to have power to adjudicate controversies arising out of that transaction, unless the litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as "traditional notions of fair play and substantial justice." . . . I can see nothing which approaches that degree of unfairness. Florida . . . was a reasonably convenient forum for all.[277]
>
> . . . we are dealing with litigation arising from a transaction that had an abundance of close and substantial connections with the State of Florida.[278]

If the Warren test quoted above suggests a greater concern with the federal nature of the nation, and if it is more restrictive of a state's judicial jurisdiction than that urged by Black, it is nonetheless a workable and not unduly confining expression of the limitations of the Due Process Clause. Before stating this test, however, Warren engaged in an unfortunate attempt to distinguish the *McGee* case.[279] The distinctions he urged were hardly persuasive[280] and the language he used was most unfortunate, for it was a return to the "exceptional" activities notions of *Doherty v. Goodman*[281] and *Hess v. Pawloski*,[282] both of which he cited as authority for his position.[283] As Mr. Chief Justice Warren once wrote: "In approaching this problem, we cannot turn the clock back. . . ."[284] In this very case he acknowledged the existence of the change which had taken place in the evolution from "the rigid rule of *Pennoyer v. Neff* . . . to the flexible standards of *International Shoe*."[285] It is possible but not necessary to read the Court's opinion in this case as a return to the standards which Professor Scott condemned forty years ago. It is more likely that it will be read, even by the Court, as a stopping place—whether permanent or temporary—on what had been the road toward nationwide in personam jurisdiction for state courts.

After disposing of the Florida case in this manner, the Delaware case was easy of resolution. "Delaware is under no obligation to give full faith and credit to a Florida judgment invalid in Florida because offensive to the Due Process Clause of the Fourteenth Amendment."[286] Thus the Court disposed of the only federal question presented by the Delaware certiorari. But the result is one which does not yet put this family battle to a final rest. For if Florida, on the remand of the case, decides that the trustees were not indispensable parties, it could enter judgment against the resident defendants in favor of Mrs. Denckla and Mrs. Stewart. The Supreme Court of the United States did not hold, for it was not properly called upon to hold, that the Delaware decree is entitled to full faith and credit in Florida. Moreover, Mrs. Denckla, and perhaps Mrs. Stewart,[287] were not parties to the Delaware litigation and were not subject to the in personam jurisdiction of the Delaware courts, according to the decision in the *Denckla* case. Thus, unless the Delaware decree is to be held binding on Florida on some thesis of in rem jurisdiction,[288] the result will be that in Delaware the children of Mrs. Hanson, who are domiciliaries of Florida, will be entitled to the assets of the 1935 trust, but in Florida Mrs. Hanson will be under the compulsion of the Florida courts to turn the assets of the 1935 trust over to Mrs. Denckla and Mrs. Stewart, pursuant to the terms of the will. The Supreme Court of the United States may well be called upon again to attempt to unravel this Gordian knot resulting from the difference of opinions of the Delaware and Florida courts.

VIII. CONCLUSION

The cases from *International Shoe* to *Denckla* reveal that although old dogma has been destroyed new doctrine has not yet been fashioned to replace it. The language of reasonableness and fair play to which the Court has resorted is rather a statement of a conclusion than a reason. The nationalization of American society has been reflected in the trend toward greater power of the states over defendants who neither owe them "allegiance" nor are subject to their physical power. But *Denckla* and *Vanderbilt* reveal that the concept of territorial limitations on state power is still a vital one.[289] The state courts and the lower federal courts are thus left to decide the cases which come before them by the traditional legal reasoning by analogy.[290] The Supreme Court opinions have revealed some if not all of the factors which are to be taken into consideration in reaching a conclusion on the issue of in personam jurisdiction. They do not reveal how each factor is to be weighed in combination with the others. It may be that it is not possible to do so and that here as elsewhere in our constitutional law the Supreme Court must depend on the good faith and good judgment of the other courts in the American judicial system. The fact is that, thus far at least, no one outside of the Court has been able to do better. The want of a "synthesis" of the decisions under the Due Process Clause[291] has not been provided except by those who would read their personal predilections into the Constitution.[292] Thus, in this area as in others, the emphasis must continue to be, as Dean Levi has told us, "on the process" by which the result is to be reached:

> Legal reasoning has a logic of its own. The structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities. Social theories and other changes in society will be relevant

when the ambiguity has to be resolved for a particular case. Nor can it be said that the result of such a method is too uncertain to compel. The compulsion of the law is clear; the explanation is that the area of doubt is constantly set forth. The probable area of expansion or contraction is foreshadowed as the system works. This is the only kind of system which will work when people do not agree completely. The loyalty of the community is directed toward the institution in which it participates. The words change to receive the content which the community gives to them. The effort to find complete agreement before the institution goes to work is meaningless. It is to forget the very purpose for which the institution of legal reasoning has been fashioned. This should be remembered as a world community suffers in the absence of law.[203]

FOOTNOTES

[1] See, e.g., Kurland, The Supreme Court and the Attrition of State Power, 10 Stanford L. Rev. 274, 292-96 (1958).
[2] Mills v. Duryee, 7 Cranch 481 (1813). See Morgan, Justice William Johnson 233-34 (1954); Jackson, Full Faith and Credit 11 (1945).
[3] The statute is now to be found in 28 U. S. C. §1738 (1948).
[4] 7 Cranch at 484.
[5] Id. at 486-87.
[6] 95 U. S. 714 (1877).
[7] Id. at 722-23.
[8] Id. at 727.
[9] Id. at 723-24. See Emanuel v. Symon [1908], 1 K. B. 302 (C. A.)
[10] 95 U. S. at 727-28.
[11] Id. at 737.
[12] Cf. Mr. Justice Traynor's opinion in Atkinson v. Superior Court, 49 Cal. 2d 339 (1958).
[13] 95 U. S. at 732-33.
[14] Id. at 733.
[15] Id. at 734-35.
[16] 326 U. S. 310 (1945).
[17] Cf. McGee v. International Life Ins. Co., 355 U. S. 220, 222-23 (1957); Hanson v. Denckla, 357 U. S. 235, 251-52, 260 (1958).
[18] Mr. Justice Schaefer, in Nelson v. Miller, 11 Ill. 2d 378, 386 (1957).
[19] Olberding v. Illinois Central R. R. Co., 346 U. S. 338, 340-41 (1953).
[20] See the text supra at n. 5. Cf. Schibsby v. Westerholz, L. R. 6 Q. B. 155 (1870).
[21] This article will not be concerned with the appropriate method of service; it is assumed herein that the method of service "most likely to reach the defendant," McDonald v. Mabee, 243 U. S. 90, 92 (1917), must be utilized to secure jurisdiction. See Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306 (1950); Walker v. Hutchinson, 352 U. S. 112 (1956).
[22] See Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 256 (1909); Blandin v. Ostrander, 239 Fed. 700 (C. A. 2, 1917); Comment, 39 Yale L. J. 889 (1930); cf. Jaster v. Currie, 198 U. S. 144 (1905).
[23] See Lamb v. Schmitt, 285 U. S. 222 (1932); Page Co. v. MacDonald, 261 U. S. 446 (1923); Stewart v. Ramsey, 242 U. S. 128 (1916); Ray, Privilege of Nonresident Attorney from Service of Civil Process, 17 Ky. L. J. 197 (1929); Keefe and Roscia, Immunity and Sentimentality, 32 Corn. L. Q. 471 (1947).
[24] McDonald v. Mabee, 243 U. S. 90, 91 (1917); cf. Michigan Trust Co. v. Ferry, 228 U. S. 346 (1913).
[25] See Beale, Jurisdiction of Courts over Foreigners, 36 Harv. L. Rev. 193, 283 (1912, 1913).
[26] See Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427 (1929); Rheinstein, Michigan Legal Studies: A Review, 41 Mich. L. Rev. 83, 91 (1942); Ehrenzweig, Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens, 65 Yale L. J. 289 (1956). Professors Rheinstein and Dodd attack the reasonableness of the rule. Professor Ehrenzweig's rejection of the historical basis for the rule in this country neglects the fact that the American states have often regarded each other as foreign sovereignties. See, e.g., Detroit v. Proctor, 44 Del. 193, 202 (1948): "Michigan's sovereignty is as foreign to Delaware as Russia's. . . . "
[27] See opinion of Black, J., in International Shoe Co. v. Washington, 325 U. S. 310, 322 (1946).
[28] See text supra, at n. 5.
[29] See Milliken v. Meyer, 311 U. S. 457 (1940).
[30] See Blackmer v. United States, 284 U. S. 42 (1932); cf. United States v. Bowman, 260 U. S. 94 (1922); Cook v. Tait, 265 U. S. 47 (1924); Skiriotes v. Florida, 313 U. S. 69 (1941) (state court jurisdiction); Note, Citizenship as a Ground for Personal Jurisdiction, 27 Harv. L. Rev. 464 (1914).
[31] Even actual consent has created some problems, as in the case of cognovit notes and consent to jurisdiction of a foreign tribunal. See, e.g., Gavit, The Indiana Cognovit Note Statute, 5 Ind. L. J. 208 (1929); Commercial Arbitration and the Conflict of Laws, 56 Col. L. Rev. 902 (1956); Grauper, Contractual Stipulations Conferring Exclusive Jurisdiction upon Foreign Courts in the Law of England and Scotland, 59 L. Q. Rev. 227 (1943).
[32] See Pennoyer v. Neff, 95 U. S. at 735; Scott, Fundamentals of Procedure 40-41 (1922).
[33] See Western Loan & Savings Co. v. Butte & B. Consol. Min. Co., 210 U. S. 368 (1908); Houston v. Ormer, 252 U. S. 469 (1920); cf. Toledo Ry. and Light Co. v. Hill, 244 U. S. 49 (1917); Cain v. Commercial Pub. Co., 232 U. S. 174 (1914).
[34] See York v. Texas, 137 U. S. 15 (1890); Kauffman v. Wooters, 138 U. S. 285 (1891); Western Indemnity Co. v. Rupp, 235 U. S. 261 (1914); Harris v. Taylor, [1915] 2 K.B. 580 (C.A.).
[35] See Adam v. Saenger, 303 U. S. 59 (1938).
[36] See Carey, A Suggested Fundamental Basis of Jurisdiction with Special Emphasis on Judicial Proceedings Affecting Decedent's Estates, 24 Ill. L. Rev. 170, 177 et seq. (1929).
[37] See Edwards v. California, 314 U. S. 160 (1941).
[38] Kane v. New Jersey, 242 U. S. 160 (1916).
[39] Hess v. Pawloski, 274 U. S. 352 (1927).
[40] 274 U. S. at 357; see Scott, Jurisdiction over Nonresident Motorists, 39 Harv. L. Rev. 563 (1926); Scott, Hess and Pawloski Carry On, 64 Harv. L. Rev. 98 (1950).
[41] Olberding v. Illinois Central R.R., 346 U. S. 338, 341 (1953).
[42] Scott, Jurisdiction over Non-residents Doing Business within a State, 32 Harv. L. Rev. 871 (1919).
[43] Scott, Jurisdiction over Non-resident Motorists, 39 Harv. L. Rev. 563 (1926) (emphasis added).
[44] Id. at 586 (emphasis added).
[45] 274 U. S. at 356.
[46] Id. at 355.
[47] See Flexner v. Farson, 248 U. S. 289 (1919).
[48] 274 U. S. at 355.
[49] Henry L. Doherty & Co. v. Goodman, 294 U. S. 623 (1935). It should be noted that the Court distinguished the *Flexner* case on a tenuous ground suggested by Professor Scott. See

Fundamentals of Procedure, 68-69 (1922); see also Nelson v. Miller, 11 Ill. 2d. 380, 388-89 (1957).

[50] See quotation from Pennoyer v. Neff in text supra at n. 15; Goodrich, Conflict of Laws 209 (3d. ed. 1949); Scott, Fundamentals of Civil Procedure 47 (1922).

[51] See, for another aspect of the problems of the fiction of corporate "citizenship," McGovney, A Supreme Court Fiction, Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts, 56 Harv. L. Rev. 853, 1090, 1225 (1943).

[52] Henderson, The Position of Foreign Corporations in American Constitutional Law 77 (1918).

[53] 13 Pet. 519, 588 (1839).

[54] 18 How. 404 (1855).

[55] Id. at 407.

[56] See Riverside Mills v. Manefee, 237 U. S. 189 (1915).

[57] 106 U. S. 350, 356 (1882) (emphasis added).

[58] Id. at 357.

[59] Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 255 (1909); cf. Wuchter v. Pizzutti, 276 U. S. 13 (1928).

[60] Railroad Co. v. Harris, 12 Wall. 65 (U. S. 1840); Ex parte Schollenberger, 96 U. S. 369 (1877).

[61] 222 Fed. 148 (S.D.N.Y., 1915).

[62] Id. at 150-51.

[63] Bagdon v. Philadelphia & Reading Coal & Iron Co., 217 N.Y. 432, 437 (1917).

[64] Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 293 U. S. 93 (1917).

[65] Id. at 96.

[66] 8 Wall. 168 (1868).

[67] Id. at 181.

[68] Id. at 183. See Powell, Insurance as Commerce in Constitution and Statute, 57 Harv. L. Rev. 937 (1944).

[69] Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1 (1877); International Text Book Co. v. Pigg, 217 U. S. 91 (1910); cf. Woodruff v. Parham, 8 Wall. 123 (U. S. 1868).

[70] By 1922, the Supreme Court had made it quite clear that there were many limitations on a state's power to exclude foreign corporations unless they complied with state limitations. See, e.g., Terral v. Burke Construction Co., 257 U. S. 529 (1922); see also Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426 (1926).

[71] International Harvester Co. v. Kentucky, 234 U. S. 579 (1914); International Text Book Co. v. Pigg, 217 U. S. 91 (1910).

[72] Moulin v. Trenton Mutual Life and Fire Insurance Co., 25 N.J.L. 57, 60-61 (1855).

[73] Washington ex rel. Bond & Goodwin & Tucker v. Superior Court, 289 U. S. 361, 364 (1933).

[74] See New England Mutual Life Ins. Co. v. Woodworth, 111 U. S. 138 (1884); Barrow Steamship Co. v. Kane, 170 U. S. 100 (1898); Philadelphia & Reading R.R. v. McKibbin, 243 U. S. 264 (1917); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516 (1923); Bank of America v. Whitney-Central National Bank, 261 U. S. 171 (1923). See Cahill, Jurisdiction over Foreign Corporations and Individuals Who Carry on Business Within the Territory, 30 Harv. L. Rev. 676 (1917).

[75] 243 U. S. 264 (1917).

[76] Id. at 265.

[77] See, e.g., Judge Cardozo's opinion in Tauza v. Susquehanna Coal Co., 220 N. Y. 259 (1917), which secured a wide following in other states.

[78] Ibid.

[79] Chipman v. Thomas B. Jeffrey Co., 251 U. S. 373 (1917).

[80] Washington ex rel. Bond & Goodwin & Tucker v. Superior Court, 289 U. S. 361 (1933).

[81] See text supra at n. 62.

[82] 45 F. 2d 139 (C.A. 2, 1930).

[83] Id. at 141.

[84] Id. at 142.

[85] Id. at 141-42.

[86] See Rothschild, Jurisdiction of Foreign Corporations in Personam, 17 Va. L. Rev. 129 (1930).

[87] §167, Comm. a(1934): "Doing business is doing a series of similar acts for the purpose of thereby realizing pecuniary benefits, or otherwise accomplishing an object, or doing a single act for such purpose with the intention of thereby initiating a series of such acts." See also A.L.I., Restatement of Judgments, §30, Comm. b. (1942).

[88] See Sobeloff, Jurisdiction of State Courts over Non-Residents in our Federal System, 43 Corn. L.Q. 196 (1958), who would continue the non-federal notions.

[89] Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427, 429 (1929).

[90] Cf. Currie, Full Faith and Credit to Foreign Land Decrees, 21 U. of Chi. L. Rev. 620, 622 (1954).

[91] See id. at 666-67.

[92] See, e.g., Haffer, Personal Jurisdiction over Foreign Corporations as Defendants in the United States Supreme Court, 17 B. U. L. Rev. 639 (1937).

[93] Hyde v. United States, 225 U. S. 347, 390 (1917).

[94] 326 U. S. 310 (1945).

[95] 304 U. S. 64 (1938).

[96] See text supra at n. 84.

[97] 326 U. S. at 322 et seq.

[98] These were Arkansas, Illinois, Kentucky, North Carolina, Pennsylvania, New York, and New Hampshire. R. 15.

[99] "Salesmen are employed from the head office in St. Louis and work under the direct supervision and control of sales managers with offices in St. Louis, and are required as part of their duties to spend certain time each year in St. Louis, Missouri, for the purpose of receiving direct personal instructions as to their duties as to the line of shoes which they are to offer to the trade, the methods of selling, conditions of selling and to receive information with reference to construction and new types and kinds of shoes which are to be offered to the trade. Said employees or salesmen are given a sample line, which samples uniformly consist of only one shoe of a pair, and no sales are made by salesmen from such samples. They are merely used to display to prospective purchasers. Some of the salesmen rent sample rooms in business buildings and the expenses of such rental and maintenance is paid by the salesmen and they are reimbursed on an expense account by the International Shoe Company. Other salesmen maintain no permanent sample rooms, but rent rooms in hotels or business buildings in the various cities in which they travel . . .

". . . Each salesman is given a designated territory in which to solicit orders. The authority of the salesmen is limited to exhibiting samples of the merchandise for which they solicit orders to merchants who are probable buyers thereof; endeavor to procure orders on prices and terms fixed by the International Shoe Company. If order(s) are obtained, to transmit them to the International Shoe Company outside the State of Washington for acceptance or rejection and if orders are accepted by the International Shoe Company the merchandise called for by such orders is shipped F.O.B. shipping point, from outside of the State of Washington. . . . The merchandise which is shipped into Washington is invoiced at the point of shipment and invoices are payable at point of shipment from which collections are made. No salesman has power or authority to bind the International Shoe Company to any contract or to finally conclude any transactions in its behalf, the salemen's duties and authority being limited strictly to the solicitation of orders.

"The salesmen are under the direct control and direction of the International Shoe Company and are not permitted to be engaged in independently established trade, occupation, profession or business of the same nature involved in their employment by the International Shoe Company." R. 16-17.
[100] Wash. Rev. Stats. §9998-103a through §9998-123a.
[101] 22 Wash. 2d 146 (1945).
[102] 65 S.Ct. 1579 (1945) (not officially reported).
[103] ". . . the Court has what is termed a "regular" and "summary" docket. These designations signify no more, however, than the amount of oral argument to be allowed. In all cases on the regular docket . . . one hour is allowed on each side for oral argument, unless the Court grants more time. Two counsel, and no more, are permitted to be heard for each party. When a case is transferred to the summary docket, only a half-hour argument on each side is allowed and only one counsel will be heard on the same side." Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States 924 (Wolfson and Kurland ed. 1951).
[104] 326 U. S. at 315.
[105] 22 Wash. 2d at 169-70.
[106] 325 U. S. at 314.
[107] 220 N. Y. 259(1917).
[108] 134 F. 2d 511 (App. D. C., 1943). The Washington Court also relied on a plethora of state authorities, including Hormel and Co. v. Ackman, 117 Fla. 419 (1934); Wheeler v. Boyer Fire Apparatus Co., 63 N.D. 403 (1933); American Asphalt Roof Corp. v. Shankland, 205 Iowa 862 (1928); Dobson v. Maytag Sales Corp., 292 Mich. 107 (1940); International Shoe Co. v. Lovejoy, 219 Iowa 204 (1935); West Pub. Co. v. Superior Court, 20 Cal. 2d 720 (1942); Dahl v. Collette, 202 Minn. 544 (1938); In re Petition of Northfield Iron Co., 226 Wis. 487 (1938).
[109] 205 U. S. 530 (1907). See text supra at n. 85.
[110] 234 U. S. 579 (1914). See text supra at n. 85.
[111] 326 U. S. at 322.
[112] See text supra at nn. 83-85.
[113] See text supra at n. 62.
[114] See Dunham, Mr. Chief Justice Stone, in Dunham and Kurland, Mr. Justice (1957).
[115] 326 U. S. at 320-21.
[116] Id. at 319 (emphasis added.)
[117] Id. at 320.
[118] Id. at 323.
[119] Id. at 324.
[120] See Cardozo, The Reach of the Legislature and the Grasp of Jurisdiction, 43 Corn. L.Q. 210 (1958).
[121] See Connecticut General Life Insurance Co. v. Johnson, 303 U. S. 77, 83 (1938).
[122] 326 U. S. at 321.
[123] Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427, 437 (1929).
[124] See text supra at n. 116.
[125] See text supra at n. 83.
[126] Dodd, Jurisdiction in Personal Actions, 23 Ill. L. Rev. 427, 439 (1929).
[127] Ibid.
[128] Milwaukee County v. White Co., 296 U. S. 68 (1935).
[129] See Moore v. Mitchell, 281 U. S. 18 (1930); but cf. Massachusetts v. Missouri, 308 U. S. 1 (1939).
[130] Missouri, where International Shoe Co. had its principal offices, might have afforded Washington a forum for the collection of its taxes. See State ex rel. Oklahoma Tax Comm. v. Rodgers, 238 Mo. App. 1115 (1946); but cf. California v. St. Louis Union Trust Co., 260 S.W. 2d 821 (Mo. App., 1953). So, too, might Kentucky, where the defendant also maintained offices. Ohio ex rel. Duffy v. Arnett, 314 Ky. 403 (1950). Delaware and New York might not have proved so hospitable. See Detroit v. Proctor, 44 Del. 193 (1948); Wayne County v. American Steel Export Co., 277 App. Div. 855 (N.Y. 1st Dept., 1950). See, generally, A.L.I., Restatement of the Law of the Conflict of Laws §610 (1934); Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv. L. Rev. 193 (1932); Daum, Interstate Comity and Governmental Claims, 33 Ill. L. Rev. 249 (1938); Roesken, Out of State Collections, 27 Taxes 955 (1948).
[131] Nippert v. Richmond, 327 U. S. 416, 422 (1946).
[132] In the interim the state courts and lower federal courts were trying to apply the new law. See The Growth of the International Shoe Doctrine, 16 Univ. of Chi. L. Rev. 523 (1949).
[133] 339 U. S. 643 (1950).
[134] R. 2.
[135] Ibid.
[136] Ibid.
[137] Acts of General Assembly of Virginia, 1928, c. 524, p. 1373, as amended, Acts of General Assembly of Virginia, 1932, c. 236, p. 434.
[138] R. 7-9.
[139] R. 20.
[140] R. 27.
[141] 188 Va. 877 (1949).
[142] Art. I, §7.
[143] 339 U. S. at 651, n. 4.
[144] Id. at 649 (emphasis added).
[145] Id. at 647-48.
[146] See p. text at pp. 128-30, supra.
[147] See section V. International Life Insurance Co. v. McGee, infra.
[148] 339 U. S. at 648-49.
[149] 261 U. S. 140 (1923).
[150] See 339 U. S. at 647.
[151] 261 U. S. at 145 (1923).
[152] See Kilpatrick v. Texas and P. Ry., 166 F. 2d 788, 791 (C.A. 2, 1948).
[153] The Supreme Court has never resolved the question whether personal jurisdiction in federal courts is a matter governed by *Erie* principles. See Riverbank Laboratories v. Hardwood Products, 350 U. S. 1003 (1956).
[154] 339 U. S. at 652-53.
[155] Id. at 654-55.
[156] See text supra at n. 140.
[157] But cf. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U. S. 123 (1951).
[158] 339 U. S. at 659.
[159] Ibid.
[160] Id. at 658-59.
[161] 342 U. S. 437 (1952).
[162] See Perkins v. Perkins, 57 Phil. 205 (1932); Perkins v. Guaranty Trust Co., 274 N. Y. 250 (1937); Perkins v. Benguet Consolidated Mining Co., 55 Cal. App. 2d 720 (1942); see also Seavey, Res Adjudicata with References to Persons Neither Parties nor Privies—Two California Cases, 57 Harv. L. Rev. 98 (1943).
[163] Petitioner's Brief, p. 9.
[164] Respondent's Petition for Rehearing, pp. 3-7.
[165] 342 U. S. at 447-48.
[166] 155 Ohio St. 116, 118 (1951).
[167] 88 Ohio App. 118 (1950).
[168] 155 Ohio St. 116 (1951).
[169] Herb v. Pitcairn, 324 U. S. 117, 125-26 (1945).
[170] See Klinger v. Missouri, 13 Wall. 257, 267 (U. S. 1871); Johnson v. Risk, 137 U. S. 300, 307 (1890); Allen v. Arguim-

bau, 198 U. S. 149, 154-55 (1905); Adams v. Russell, 229 U. S. 353, 358-62 (1913); Cuyahoga Power Co. v. Northern Realty Co., 244 U. S. 300, 303-304 (1917); Lynch v. New York ex rel. Pierson, 293 U. S. 52, 54-55 (1934); Woolsey v. Best, 299 U. S. 1 (1936); McGoldrick v. Gulf Oil Corp., 309 U. S. 2 (1940); White v. Ragen, 324 U. S. 760, 765-67 (1945); Woods v. Nierstheimer, 328 U. S. 211 (1946); Hedgebeth v. North Carolina, 334 U. S. 806 (1948).

[171] See Loftus v. Illinois, 334 U. S. 804 (1948); Young v. Ragen, 337 U. S. 235 (1949); cf. Honeyman v. Hanna, 300 U. S. 14 (1937); Parker v. Los Angeles, 338 U. S. 327, 332-33 (1949); See also Wolfson and Kurland, Certificates by State Courts of the Existence of a Federal Question, 63 Harv. L. Rev. 111 (1949).

Even when a certificate is secured, the result may be an unhappy one unless it reveals an unambiguous resolution of a federal question as an indispensable ingredient of the state court's judgment. See the futility of the Supreme Court's judgment in Somers v. Covey, 351 U. S. 141 (1956), which was properly disregarded by the New York Court of Appeals, 2 N. Y. 2d 250 (1957), review denied 354 U. S. 916, 919 (1957).

[172] 342 U. S. at 449.

[173] 155 Ohio St. at 120. On remand, after judgment, it was Mr. Justice Taft who alone of the Court wanted to hold that it was state law which had called for the result. 158 Ohio St. 145 (1952).

[174] 342 U. S. at 445-46.

[175] Id. at 444-45.

[176] 339 U. S. at 649.

[177] See text supra, at nn. 6-11, 13-15. But cf. Atkinson v. Superior Court, 49 Cal. 2d 339 (1958).

[178] See Petitioner's Brief, p. 14.

[179] See Dismissal of Suits Brought by a United States Citizen Where Alternative Forum Is Abroad, 25 U. of Chi. L. Rev. 377 (1958); Forum Non Conveniens—Trial Court's Discretion Limited When Forum Non Conveniens Would Force American Plaintiff to Sue in Foreign Courts, 103 U. of Pa. L. Rev. 830 (1955).

[180] See text supra at n. 152.

[181] 345 U. S. 663 (1953).

[182] Id. at 664.

[183] 28 U.S.C. §1391(c): "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

[184] 197 F. 2d 74 (C.A. 5, 1952).

[185] Justices Frankfurter and Douglas did not participate. 345 U. S. at 667.

[186] "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is brought."

[187] 345 U. S. at 667, n. 3.

[188] Id. at 667.

[189] See Rule 12(h) of the Federal Rules of Civil Procedure; 2 Moore's Federal Practice ¶12.23 (2d ed.). Rule 12(b) carefully distinguishes between improper service and want of personal jurisdiction as a basis for a motion to dismiss.

[190] 345 U. S. at 670.

[191] 28 U. S. C. §1404(a): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Cf. §1406(a): "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

"There are grounds for suggesting that the section should not be applied to cases removed from state courts. See Braucher, The Inconvenient Federal Forum, 60 Harv. L. 908, 934-35 (1947). But cf. Ex parte Collett, 337 U. S. 55 (1949); White v. Thompson, 80 F. Supp. 411 (N.D. Ill., 1948); Rhodes v. Barnett, 117 F. Supp. 312 (S.D.N.Y., 1953); Chicago, R.I. and P. Ry. Co. v. Igoe, 212 F. 2d 378 (C.A.th, 1954)." Currie, Change of Venue and the Conflict of Laws, 22 U. of Chi. L. Rev. 405, 408, n. 14 (1955).

[192] 345 U. S. at 671.

[193] Ibid.

[194] Prior to 1948, Mr. Justice Jackson, who joined Black's opinion, had stated, on behalf of the Court, that requirements of jurisdiction and venue must be met before any question of choice of forum under forum non conveniens could be put. See Gulf Oil Corp. v. Gilbert, 330 U. S. 501 (1947). And Judge Learned Hand, who had earlier suggested the similarity of tests for forum non conveniens and in personam jurisdiction did not think it followed that §1404(a) created nationwide jurisdiction in federal courts, which would be the result of the view expressed by Black in *Polizzi*. See Foster-Milburn Co. v. Knight, 181 F. 2d 949 (C.A. 2, 1950).

[195] See Currie, op. cit. supra n. 191, at pp. 416-438. The exacerbation of the problem dealt with by Professor Currie, were the changes implicit in Black's suggestion to take place, is awesome.

[196] 335 U. S. 220 (1957).

[197] The Chief Justice had recused himself. Id. at 224.

[198] R. 21-36.

[199] R. 30.

[200] R. 21-36.

[201] R. 35.

[202] R. 33.

[203] R. 17.

[204] Insurance Code of California §§1610-20.

[205] R. 18-20, 50-52.

[206] 228 S.W. 2d 579 (1956).

[207] 355 U. S. at 221.

[208] 28 U. S. C. §1257 (3). See text and cases cited supra at n. 170; Cox v. Texas, 202 U. S. 446, 451 (1906); but cf. Terminiello v. Chicago, 337 U. S. 1 (1949).

[209] 355 U. S. at 222.

[210] Ibid.

[211] Id. at 223.

[212] Ibid.

[213] 281 App. Div. 487 (N.Y., 1st Dept., 1953), cited at 355 U. S. 223, n. 2; cf. Schutt v. Commercial Travelers Mutual Accident Assn., 229 F. 2d 158 (C.A. 2, 1956).

[214] Minnesota Commercial Men's Association v. Benn, 261 U. S. 140 (1923).

[215] 326 U. S. at 319.

[216] See text supra at nn. 149-151.

[217] 354 U. S. 416 (1957).

[218] Id. at 418-19.

[219] "Possibly the most flagrant misapplication that the term "in rem" has ever received is in matrimonial actions . . . To sustain the constitutional power to grant relief on constructive service against nonresidents, the courts found a res in the marital relation and then proceeded to give it a situs at the marital domicile. There is no more a res here than between persons to any contract. It is all a fiction. The formula evolved in Pennoyer v. Neff is, however, satisfied. The truth is that

the courts saw the necessity, if divorce laws were to be carried out in any measure, of permitting divorce to be obtained in that way under certain circumstances. The fictions led to trouble in this class of cases with the result that we have parties married in one state and divorced in another. The difficulty came with the conception of a divisible res after the initial conception of a res. Courts will eventually reach the point of permitting a conclusive adjudication by the courts of the state in which one of the married parties is domiciled although the defendant, a nonresident, is served constructively." Carey, A Suggested Fundamental Basis of Jurisdiction with Special Emphasis on Judicial Proceedings Affecting Decedent's Estates, 24 Ill. L. Rev. 170, 171 (1929). Professor Carey was a true prophet with regard to the dissolution of the fiction with reference to divorce; the fiction would seem to have had continued effect so far as alimony is concerned.

[220] Mr. Justice Frankfurter's stinging dissent points out the lack of warrant for suggesting that there was jurisdiction to grant the divorce but no jurisdiction to resolve the issue of alimony between the parties. "No explanation is vouchsafed why the dissolution of the marital relation is not so 'personal' as to require personal jurisdiction over an absent spouse, while the denial of alimony incident thereto is. Calling alimony a 'personal claim or obligation' solves nothing. I note this concern for 'property rights,' but I fail to see why the marital relation would not be worthy of equal protection, also as a 'personal claim or obligation.' It may not be translatable into dollars and cents, but that does not make it less valuable to the parties. It cannot be assumed by judicial notice as it were, that absent spouses value their alimony rights more highly than their marital rights. Factually, therefore, both situations involve the adjudication of valuable rights of an absent spouse, and I see no reason to split the cause of action and hold that a domiciliary State can ex parte terminate the marital relation, but cannot exparte deny alimony . . ." Id. at 424. See also the dissents of Mr. Justice Harlan, id. at 428 et seq., and Judge Fuld, in the New York Court of Appeals, 1 N.Y. 2d 342, 353 (1956).

[221] 355 U. S. at 222.

[222] Id. at 224. Cf. Nelson v. Miller, 11 Ill. 2d 378, 382-83 (1957).

[223] 357 U. S. 235 (1958).

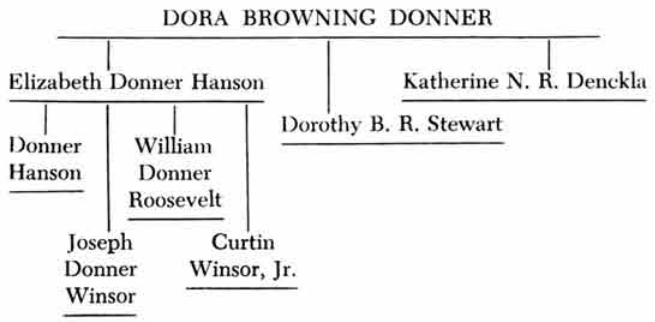
[224] No. 107, O. T. 1957.

[225] No. 117, O. T. 1957.

[226] No. 107, R. 187; No. 117, R. A.-244. See n. 272 infra.

[227] No. 107, R. 12.

[228] The family relationships are indicated by the following chart which does not purport to be an accurate reflection of the relative birth dates of the persons named.



[229] There were other nonresident defendants who were not served Florida, but they may be ignored in the consideration of the problems presented to the Court by these cases.

[230] Fla. Stat., 1957, c. 48, 48.01, 48.02, set out at 357 U. S. [241] n.3.

[231] A default judgment was entered against them. No. 107, R. 41-42. The final order in the trial court dismissed the case as to them. Id. at 110-11. But the default judgment was reinstated by the decision of the Florida Supreme Court. Id. at 181-92.

[232] No. 107, R. 112-19. At this point there was no suggestion that the exercise of jurisdiction over the resident defendants in the absence of indispensable parties contravened the Due Process Clause; indeed, no such contention is to be found in the record at all. The constitutional attack took the form set out in the following footnote.

[233] "These defendants are informed and believe that the defendants hereto sought to be served by constructive process will not submit themselves to the jurisdiction of this Court by appearing herein. The exercise by this Court of the jurisdiction sought to be invoked by the plaintiffs herein would contravene the Constitution and Laws of the State of Florida and the Constitution of the United States, and, in particular, Section I of the Fourteenth Amendment to the United States Constitution." Motion to dismiss, No. 107, R. 41; see also id. at 53, 127, 195. It is noteworthy that in the resident defendants' petition for rehearing after the trial court had ruled against them on the merits and in their favor on the issue of jurisdiction over the nonresident defendants, the Due Process argument was not offered. See id. at 112.

[234] "As to jurisdiction, the trust assets and the trustees are in Delaware. No personal service has been had upon the defendants who failed to answer. The inclusion of the trust assets in her inventory, and an allowance of counsel fees and compensation for the executrix, although such an inclusion was later sought to be withdrawn, does not of itself give this court jurisdiction over these assets in Delaware or the Trustees. Hence, this court considers that it has no jurisdiction over the non-answering defendants." No. 107, R. 110-11.

[235] "It seems clear to me, from the authorities, that the power of appointment was testamentary in character and did not constitute a valid inter vivos trust appointment. As the appointment had only one subscribing witness, rather than two, as required in Florida, it did not constitute a valid testamentary disposition." No. 107, R. 111.

[236] Ibid.

[237] Mr. Chief Justice Warren noted the appearance in Delaware of all but Mrs. Denckla. 357 U. S. 242. But it would seem that the only appearance for Mrs. Stewart was by a guardian ad litem appointed by the Delaware court, without any apparent authority from the guardian in Florida where Mrs. Stewart, an incompetent, was domiciled.

[238] 119 A. 2d 901 (1955). The Delaware court, in speaking of doctrines of res adjudicata and collateral estoppel raised questions relevant to the problem of full faith and credit, though the issue had not been presented at that point: "The doctrine of *res judicata* is not applicable because the Florida action and this action involve different causes of action." Id. at 905. "It is my opinion that it would be contrary to sound public policy for this Court to consider itself bound and divested of its duty to determine the essential validity of a Delaware *inter vivos* trust in a direct proceeding brought for the purpose on the ground that a Court in a sister jurisdiction has incidentally determined the matter in another cause of action in which neither the trust *res* nor the Trustee was before the Court. The doctrine of collateral estoppel is a judge-made rule. I do not think that it should be enlarged to the extent of depriving the parties herein of a direct determination by this Court as

to the validity of the Trust . . . Moreover, the application of the doctrine of collateral estoppel might work injustice in this, a case which involves only questions of law. It would mean that the parties who were before the Court in the Florida action would be subjected to one conclusion of law while Wilmington Trust Company, Delaware Trust Company and other appointees and beneficiaries who did not appear in the Florida action, would be controlled by a different rule of law. This could mean that (1) as to the parties before the Florida Court, the disposition of assets would be governed by the residuary clause of the Will, but (2) as to the parties who were not before the Florida Court, the disposition of assets would be governed by the terms of the 1935 Agreement and the exercise of the power of appointment thereunder. This would result in chaos and injustice. The possibility of such result militates against application of the doctrine of collateral estoppel in any case. See Restatement of Judgments, 70 and com. f, 1948 Supp; Scott "Collateral Estoppel by Judgment," 56 Harv. L. Rev. 1, 10." Id. at 907.

[239] No. 107, R. 192.

[240] No. 107, R. 182-86; see n. 273 infra.

[241] "We next consider the contention made on the cross-appeal that the chancellor erred in ruling that he lacked jurisdiction over the persons of certain absent defendants, summoned to appear by constructive service of process. These defendants were the trustees and persons who would benefit under the last power of appointment executed under the trust, and against the will. In *Henderson v. Usher* . . . we upheld constructive service of a citizen of New York, although the trust "res," consisting entirely of intangible personalty, was physically located in New York, and the trust was administered there by the Chase National Bank, as trustee. We held the constructive service was valid in that state of the record because substantive jurisdiction existed in the Florida court by virtue of construction of a will, which was also involved, the testator having been domiciled in Florida. We observed that it was not essential that the assets of the trust be physically in this state in order that constructive service be binding upon a nonresident where the problem presented to the court was to adjudicate, inter alia, the status of the securities incorporated in the trust estate and the rights of the nonresident therein. It is entirely consistent with the *Henderson* case to hold, as we do, that the court below erred in ruling that it lacked jurisdiction over the persons of the absent defendants. With this view of the case, we need not consider the contention of cross-appelles that the absent defendants are necessary parties under *Martinez v. Balbin*, Fla., 76 So. 2d 488." No. 107, R. 191-92.

[242] No. 107, R. 198.

[243] No. 107, R. 204.

[244] "The demand of full faith and credit for the Florida judgment as the prop for the assertion of personal liability against Wilmington Trust Company is defeated by the fact that Wilmington Trust Company has never been served personally with Florida process, nor has it appeared in any form in the Florida litigation. The recital of these facts is sufficient to require the denial of full faith and credit to the Florida judgment when it is sought to be made the basis for the assertion of personal liability." 128 A. 2d 819, 831 (1957). "It is, of course, true that the courts of Florida may adjudicate with reference to a res within its boundaries and subject to its control and full faith and credit may be successfully claimed for such a judgment in the courts of other states. Restatement, Conflict of Laws, 429. But a judgment which has the force of a judgment in rem with respect to assets located in Florida does not acquire by reason of the full faith and credit clause any extra-territorial effect upon assets located outside of the State of Florida in the absence of seizure by the Florida courts. *Riley v. New York Trust Co.*, 315 U. S. 343 . . . To have any extra-territorial effect such a judgment must have been rendered after the acquisition of jurisdiction over the party claiming the non-Florida assets. *Baker v. Baker, Eccles & Co.*, 242 U. S. 394 . . . The res, over which these parties are contending consists entirely of corporate securities which at all times since 1935 have been located in Delaware. There has been no seizure of them by any judicial process in Florida, nor has any person or corporation holding the assets voluntarily by appearance brought them before the Florida courts." Id. at 831-32.

On the question of privity between the trustees and the beneficiaries, the Delaware Supreme Court said: ". . . it is impossible to accept on principle the argument that a judgment against a cestui que trust binds the nonappearing trustee. At the argument, counsel for both groups stated that they had found no authority so holding, nor have our own researches disclosed any. Upon reflection, we are not surprised that there is none, for any such rule might permit a beneficiary by shopping around among jurisdictions to defeat the trust, against the manifest intent of the trustor. We, therefore, are of the opinion that the nonappearing defendants in Florida are not estopped by the judgment on the ground of privity with appearing defendants." Id. at 835.

In discussing the issue of collateral estoppel, the court announced the public policy of Delaware in the following terms: "Finally, we think the public policy of Delaware precludes its courts from giving any effect at all to the Florida judgment of invalidity to the 1935 trust . . . . To give effect to the Florida judgment would be to permit a sister state to subject a Delaware trust and a Delaware trustee to a rule of law diametrically opposed to the Delaware law. It is our duty to apply Delaware law to controversies involving property located in Delaware and not to relinquish that duty to the courts of a state having at best only a shadowy pretence of jurisdiction." Ibid.

[245] See text supra at n. 242. The Court cited Radio Station WOW v. Johnson, 326 U. S. 128 (1945), for this proposition. See also Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States §75 (Wolfson & Kurland ed., 1951).

[246] The Court here cited Wilson v. Cook, 327 U. S. 474, 482 (1946), and Charleston Federal Savings and Loan Ass'n v. Alderson, 324 U. S. 182 (1945). See also Robertson and Kirkham, op. cit. supra n. 245 at §11.

[247] See Robertson and Kirkham, op. cit. supra n. 245 at §20.

[248] "With personal jurisdiction over the executor, legatees, and appointees, there is nothing in federal law to prevent Florida from adjudicating concerning the respective rights and liabilities of those parties. But Florida has not chosen to do so." 357 U. S. at 254.

[249] Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Marketing Ass'n, 276 U. S. 71, 88 (1928); Tyler v. Judges of Court of Registration, 179 U. S. 405 (1900).

[250] The Court here relied on Chicago v. Atchison, T. & S. F. R. Co., 357 U. S. 77 (1958), where the *Liberty Warehouse* test, see text at n. 249 supra, was not and could not be in issue.

[251] 357 U. S. at 254-55.

[252] See nn. 234 and 235 supra.

[253] See n. 241 supra.

[254] "Even if it be assumed that the Court is right in its jurisdictional holding, I think its disposition of the two cases is unjustified. It reverses the judgment of the Florida Supreme Court

on the ground that the trustee may be, but need not be, an indispensable party to the Florida litigation under Florida law . . . The Florida judgment is thus completely wiped out even as to those parties who make their homes in that State, and even though the Court acknowledges there is nothing in the Constitution which precludes Florida from entering a binding judgment for or against them . . . In my judgment the proper thing to do would be to hold the Delaware case until the Florida courts had an opportunity to decide whether the trustee is an indispensable party. Under the circumstances of this case I think it quite probable that they would say he [sic] is not. See *Trueman Fertilizer Co. v. Allison*, 81 So. 2d 723. I can see no reason why this Court should deprive Florida plaintiffs of their judgment against Florida defendants on the basis of speculation about Florida law which might well turn out to be unwarranted." 357 U. S. at 261-62.

[255] "The Court will not 'anticipate a question of constitutional law in advance of the necessity for deciding it' . . . 'It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case' . . ." Brandeis, J., concurring in Ashwander v. T. V. A., 297 U. S. 288, 346-47 (1936). Cf. Jackson, J., concurring in Herb v. Pitcairn, 324 U. S. 117 127-28 (1945). *Herb v. Pitcairn* was purportedly distinguished in the majority opinion, see 357 U. S. at 255.

[256] Tyler v. Court of Registration, 175 Mass. 71, 76-77 (1900).

[257] Some of the unfortunate and unnecessary difficulties created by the use of the situs of property as the sole forum competent to deal with litigation relevant to that property have been cogently demonstrated by Professor Currie. See Currie, Full Faith and Credit to Foreign Land Decrees, 21 Univ. of Chi. L. Rev. 620 (1954).

[258] See text at nn. 88-91 supra.

[259] See Mr. Justice Jackson's opinion for the Court in Mullane v. Central Hanover Bank and Trust Co., 339 U. S. 306, 312-13 (1950).

[260] 357 U. S. at 246.

[261] Id. at 247.

[262] Id. at 247-48.

[263] "Florida's interest in the validity of Mrs. Donner's appointment is made more emphatic by the fact that her will is being administered in that State. It has traditionally been the rule that the State where a person is domiciled at the time of his death is the proper place to determine the validity of his will, to construe its provisions and to marshal and distribute his personal property. Here Florida was seriously concerned with winding up Mrs. Donner's estate and with finally determining what property was to be distributed under her will. In fact this suit was for that very purpose." 357 U. S. at 259.

[264] 357 U. S. at 263.

[265] 49 Cal. 2d 339, 316 P. 2d 960 (1957), appeals dismissed cert. denied 357 U. S. 567, 568 (1958). The *Atkinson* cases were pending in the Supreme Court on appeals and petitions for certiorari at the time the *Denckla* case was decided. It had been held without decision on the petition for a long time. The cases presented serious questions whether the Supreme Court could properly entertain jurisdiction including questions of mootness and finality.

[266] "For the reasons stated above, . . . the multiple contacts with this state fully sustain the jurisdiction of the superior court to exercise quasi in rem jurisdiction over the intangibles in question." 49 Cal. 2d at 348.

[267] 357 U. S. at 251.

[268] Id. at 260.

[269] Id. at 253.

[270] Id. at 258. See Professor Currie's recent articles on choice of law which would support Black's thesis of the relevance of choice of law criteria to choice of forum criteria. Survival of Actions: Adjudication v. Automation in the conflict of Laws, 10 Stanf. Rev. 205 (1958); Married Women's Contracts: A Study in Conflict of Laws, 25 Univ. of Chi. L. Rev. 227 (1958).

[271] See, e.g., Matter of Bankers Trust Co. (Pratt), 5 App. Div. 2d 501 (N.Y., 1st Dept. 1958); National Shawmut Bank of Boston v. Cumming, 325 Mass. 457 (1950); Warner v. Florida Bank & Trust Co., 160 F. 2d 766, 771 (C. A. 5, 1947); Wilmington Trust Co. v. Wilmington Trust Co., 24 A. 2d 309 (Del., 1942) (this case also involved a Donner family trust); A. L. I., Restatement of Conflict of Laws §294(2) (1934).

[272] See, e.g., Maynard v. Farmers' Loan & Trust Co., 208 App. Div. 112, aff'd 238 N. Y. 592 (1924); Goodrich, Conflict of Laws §177 (3d ed., 1949).

[273] Thus, it was Warren's position that "It is the validity of the trust agreement, not the appointment, that is at issue here." 357 U. S. at 253. But Black took the position: "In my judgment it is a mistake to decide this case on the assumption that the Florida courts invalidated the trust established in 1935 by Mrs. Donner while she was living in Pennsylvania. It seems quite clear to me that those courts had no such purpose. As I understand it, all they held was that an appointment made in Florida providing for the disposition of part of the trust property made after Mrs. Donner's death was (1) testamentary since she retained complete control over the appointed property until she died, and (2) ineffective because not executed in accordance with the Florida statute of wills." 357 U. S. at 256-57, n. 1. Whatever Mr. Justice Black's understanding, the Florida Supreme Court certainly stated that they were passing on the validity of the trust: "The validity of an attempted inter vivos trust such as this is a matter of first impression in this state." No. 170, R. 187. "Although any of these reservations of power in the settlor, standing alone, might not have been enough to render the trust invalid . . . the cumulative effect of the reservations was such that the relationship established divested the settlor of virtually none of her day-to-day control over the property or the power to dispose of it on her death, and the trust was illusory." Id. at 189. "We reemphasize that we do not, and need not, hold that the reservation of the power of appointment, or any other factor standing alone, would suffice to invalidate the remainder interests sought to be created under this trust. It is enough to observe that if, as to the remaindermen, this trust is not invalid as an agency agreement, and testamentary as the court below found, it is difficult to understand what further control could be retained by a settlor to produce this result, and the principles to which we have alluded above would lose their meaning." Id. at 191. Cf. the quotation from Mr. Justice Black's opinion at n. 263 supra, where he suggests that the place of probate of the will offers a basis for applying Florida law.

[274] 357 U. S. at 254.

[275] Id. at 251.

[276] Id. at 253-54.

[277] Id. at 258-59.

[278] Id. at 260.

[279] Id. at 251-52.

[280] The one factual distinction which stands up is the fact that in the *Denckla* case the defendant did no solicitation of business in that State either by person or by mail." Ibid. But the cause of action in *Denckla* arose "out of an act done or transaction consummated in the forum State," ibid, to the same degree as in *McGee*, for the claim in Florida is based on the will. The relationships of the trustee with Florida, by inter-

change of mail with Mrs. Donner, were even more extensive than the contacts of the insurance company with California in *McGee*. The trustee "chose to maintain business relations with Mrs. Donner in that State for eight years, regularly communicating with her with respect to the business of the trust, including the very appointment in question." 357 U. S. at 259. The fact that California had enacted a special jurisdictional statute for nonresident defendants can hardly effect a difference in the application of the Due Process Clause to the transaction in question. All that the statute could do, so far as the federal issue is concerned, is to give notice to a future litigant of his potential liability to the jurisdiction of the California courts. But in *McGee*, the statute was retroactively applied with the approval of the full court. See also Allen v. Superior Court, Cal. 2d 306 (1953); Nelson v. Miller, 11 Ill. 2d 378 (1957).

[281] 294 U. S. 623, 627 (1935).

[282] 274 U. S. 352 (1927).

[283] 357 U. S. at 253.

[284] Brown v. Board of Education, 347 U. S. 483, 492 (1954).

[285] 357 U. S. at 251.

[286] Id. at 255.

[287] See note 237 supra.

[288] "Properly speaking such assets are intangibles that have no 'physical' location. But their embodiment in documents treated for most purposes as the assets themselves make them partake of the nature of tangibles. Cf. *Wheeler v. Sohmer*, 233 U. S. 434, 439." 357 U. S. at 247, n. 16.

[289] Cf. Davies v. British Geon, Ltd., [1957] 1 Q. B. 1.

[290] See Levi, An Introduction to Legal Reasoning (1949).

[291] See Swisher, The Supreme Court in Modern Role (1958).

[292] See, e.g., Pritchett, The Political Offender and the Warren Court (1958).

[293] Levi, op. cit. supra n. 290, at 73-74.

The Supreme Court, Congress and State Jurisdiction Over Labor Relations

By BERNARD D. MELTZER
Professor of Law,
The University of Chicago Law School

The difficulties surrounding state jurisdiction over labor relations moved a thoughtful commentator, writing in 1954, to describe the situation as a "constitutional crisis."[1] There will naturally be disagreement as to whether "crisis" was too strong a word. There will, however, be, I believe, general agreement that subsequent decisions of the Supreme Court have reflected growing disorder and difficulties. The Court's two most recent opinions, in *Russel*[2] and *Gonzales*,[3] which provoked sharp dissents, have further blurred the borderland of state competence. Accordingly, the re-examination of the Court's work in this area which will be undertaken here may be justified despite the pages of scholarship which have been devoted to the issues involved.[4]

An appreciation of the difficulties involved as well as their source will be promoted by a reference to the familiar constitutional and statutory framework within which the Court has dealt with federal and state power over labor relations.[5] Congressional power over labor relations has in general depended on the scope given to the commerce power. Under the restrictive constitutional doctrine prevailing prior to the constitutional revolution of the thirties, labor relations were beyond the commerce power. Prior to the enactment of the Wagner Act in 1935, substantially all governmental regulation of labor-management relations (except as to instrumentalities of commerce, such as railroads and shipping lines) was state regulation. In 1937, the Supreme Court came to terms with a new regime of federal regulation, upheld the national authority to regulate labor relations in manufacturing enterprises, and sustained the constitutionality of the Wagner Act.[6]

In the Wagner Act, the federal power over commerce had been fully exercised, in part at least, because it had previously been given such narrow scope by the Court. After that Act was sustained, each decision broadening the constitutional authority under the commerce clause enlarged the statutory power of the NLRB. Thus the reach of the Board's statutory jurisdiction was determined by the accidents of constitutional litigation rather than by a considered judgment concerning either the desirability of extending federal labor regulation to enterprises of predominantly local character or the capacity of the national board to exercise effectively the far reaching responsibilities conferred on it by essentially constitutional adjudication. Insofar as the recognition of federal competence operated to oust state power over matters "affecting commerce," constitutional considerations, although often fortuitous as to the proper adjustment between state and federal regulation, were decisive.

In the early administration of the Wagner Act, the newly-confirmed federal power was for a time pressed close to its periphery. As a result, the NLRB was in danger of being swamped by a mass of cases which it considered relatively minor and which would have conscripted the time and energies necessary for the effective handling of cases which appeared to the Board to have a more significant impact on the national interest. In order to husband its resources, which appeared inadequate for the full exercise of its statutory authority, the Board, as a matter of administrative policy, declined on a case-by-case basis to exercise jurisdiction over small business and particular types of business, such as hotels and restaurants, which it considered essentially local in character.[7]

Although the reach of the Wagner Act was long, encompassing all enterprises whose impact on interstate commerce could be said to be more than *de minimis*,[8] its purpose and its prohibitions were relatively narrow. It was designed to protect the employees' freedom to choose representatives for collective bargaining and to engage in the group activity which usually precedes and accompanies such bargaining. The Act implemented those purposes by proscribing employer coercion and interference with such activities and by providing for representation machinery which would register the employees' wishes.

The Wagner Act did not regulate union pressures in any way, and it was generally assumed that state competence over such matters remained.[9] Nevertheless, the overtones of several Supreme Court decisions[10] suggested that the Court might curtail state competence by expansively reading the national proscription of employer interference with "concerted activities" as precluding similar interference through state regulation.

There was no occasion to resolve this problem because the enactment of the Taft-Hartley Act[11] significantly changed the framework in which state power was to be defined. The purposes behind the Act were

*Footnotes start on page 125.

much broader than those of the original NLRA. At the risk of oversimplification, three of its principal purposes may usefully be mentioned: (1) protection of employee self-determination against union, as well as employer, pressures,[12] (2) protection of employers and the public against the disruption caused by certain "bad practices" by unions,[13] (3) a general increase in the power of employers relative to that of unions, whose strength had grown and had been vigorously exerted during the war and post-war period.[14] To achieve these purposes, the Act regulated strikes, picketing and boycotts. In addition, it sought to protect the integrity of collective bargaining agreements by proscribing pressures to modify them during their agreed upon term[15] and by providing for their enforcement in federal courts.[16]

Taft-Hartley thus laid hold of aspects of labor relations which, except for the incidental impact of the Sherman Act, had been left wholly to state regulation. Such regulation was, however, not a discreet and nicely identifiable body of law. It consisted not only of labor relations statutes, tailor-made for labor-management problems, but also of an extensive body of statutory and common law regulation of general application which impinged on such problems.

Even if Congress had been aware of the problems of federalism posed by the Act, Congressional formulation of guides for allocating power would have involved formidable intellectual and political difficulties. It is, however, reasonably clear that Congress, including the principal draftsmen of the Act, did not appreciate the problems involved,[17] let alone the fact that the ultimate allocation between state and national authority could frustrate the purposes articulated by particular legislators and shared perhaps by a majority of them. In any event, Congressional directions were, as the Court has frequently observed, fragmentary and elusive.[18] As a result, there was committed to the Court the task of adjusting two intricate systems of regulation. The Court, in turn purported to determine what Congress "intended," or what it would have "intended" if it had appreciated the problems involved, or perhaps what kind of adjustments between federal and state power made sense within the framework of the national regulation.

This task is always difficult in part because of the controversy surrounding the proper role of the states under modern economic and technological conditions and also because of the difficulty of separating the issue of who should regulate from issues concerning the merits of particular regulation. In the context of labor relations, two considerations made the latter issue peculiarly acute: (1) The "community," as well as unions and employers, have remained sharply divided as to content of a wise labor policy; (2) unions generally urged the contraction of state power while employers generally urged its preservation. The Court, assuming that it could stay above the partisan battle, could scarcely expect powerful, vocal, and disappointed interest groups to concede its detachment. Thus the coalescence of touchy problems of federalism with controversial issues of labor policy invited public misunderstanding and disparagement of the Court's work.

The Court's treatment of the problems involved will be better understood in the light of three familiar categories of conduct developed by the NLRB and the federal courts for the purpose of administering the Wagner Act and subsequently the LMRA.

(1) activity protected by federal law;
(2) federally prohibited activity; and
(3) an intermediate category of activity, neither protected nor prohibited by federal law.[19]

"Protected" conduct under the Wagner Act covered a broad range of group activities which were protected against employer interference or reprisal. Such protection was afforded in general terms by the broad language of Section 7, which in turn was implemented by more specific prohibitions of certain forms of employer conduct embodied in Section 8. In addition, Section 8 prohibited certain forms of conduct on the part of labor organizations. Employees participating in such conduct were divested of statutory protection, i.e., were not in general protected by law against the exercise of the employer's economic power. Activities neither protected nor prohibited consisted of group conduct which, although free from federal prohibition, was considered to be unworthy of legislative protection against the employer's economic power.

The Act did not, however, define with any clarity the standards for distinguishing between protected and unprotected conduct. The Board, which was frequently reversed by the courts, developed elastic and fluctuating lines between the two types of activities.[20] These lines reflected an attempt to balance the employees' interest in group activities, against a cluster of competing interests. Illustrative of the latter were orderly and efficient production,[21] the performance of no-strike obligations[22] and of other employee obligations based on the mutual responsibilities considered appropriate to the employment relationship,[23] the basic objectives of federal labor-management regulations[24] and of other federal statutes;[25] and the avoidance of violence and intimidation.[26]

State Regulation of Federally Protected Conduct

The failure of the Wagner Act to regulate employee activities, its silence about state power,[27] and the bitter controversy which surrounded the legislation of restraints on employer power, might have been read

as an indication that state power was not to be curtailed. State regulation, designed ostensibly at least to promote the public interest, was manifestly different from the exercise of private economic power, designed to promote private interests. Nevertheless, *Hill v. Florida*[28] suggested that the Wagner Act would be expansively read as excluding state, as well as employer, interference with protected activities. In that case, the Court invalidated a Florida criminal statute imposing licensing requirements on union agents and reporting requirements on unions.[29] The Court, equating state interference with employer interference, concluded that Florida's restriction on the freedom of employees to choose a bargaining representative was incompatible with the declared national purpose of promoting such freedom.[30] This decision was an understandable reaction to the harsh features of the Florida law, which could be viewed as an effort to frustrate the central purpose of the national scheme. But, as Mr. Justice Frankfurter forcefully urged in dissent, there was nothing in the Wagner Act which was directed at restraining state power. Accordingly, the state regulation could have operated without "conflict" with the federal scheme. The Court's rejection of this approach and its broad rationale implied that a large body of state regulation would be invalidated, but this implication was scarcely noticed at the time.[31]

After the passage of Taft-Hartley, the opponents of state power could urge, first, that *Hill* v. *Florida,* which had not been disturbed by *Congress,*[32] precluded state regulation of "protected activities" and, secondly, that Congressional regulation of certain forms of union conduct excluded supplementary as well as parallel state regulation.[33]

In the so-called *Briggs-Stratton* case, the Court considered only the question raised by first contention[34] as the substantial one. Perhaps this emphasis arose from the fact that the case had come before the state board when the Wagner Act, which did not regulate union practices, was in effect. Since, however, the Wisconsin order was to continue in effect after the enactment of the LMRA, the Court considered the order in relation to both statutes.

The Wisconsin order challenged in *Briggs-Stratton* had restrained unannounced and intermittent work stoppages called by a union during negotiations for a new contract without any disclosure of the union's demands. Speaking through Mr. Justice Jackson, the Court, in a 5 to 4 decision, rejected the broad argument that Congress had completely ousted state power over labor relations. It accepted, however, the narrower contention that the states were precluded from prohibiting conduct protected by federal law, and it declared generally that the states could reach only employee conduct which was neither federally protected nor prohibited. The Court indicated, moreover, that the states could prohibit conduct illegal because of the methods involved,[35] but that they could not outlaw the purposes of union or employee conduct solely on the ground that they were pursued by concerted action.[36] Concluding that the "quickie strike" was a "coercive" method which was neither federally protected nor prohibited,[37] the Court sustained the Wisconsin order.

The general approach reflected in *Briggs-Stratton* became the basis for an unanimous decision in *International Union* v. *O'Brien,*[38] which invalidated a Michigan statute prescribing a favorable employee strike-vote and a waiting period as prerequisites for strike action. The decisive consideration was that:

> . . . In the National Labor Relations Act . . . Congress safeguarded the exercise by employees of "concerted activities" and expressly recognized the right to strike. It qualified and regulated that right in the 1947 Act. . . . None of these sections can be read as *permitting concurrent state regulation of peaceful strikes for higher wages.* Congress occupied *this field* and closed it to state regulation. . . .
>
> "Even if some state legislation in this area could be sustained the particular statute before us could not stand. For it conflicts with the federal act."[39] (Emphasis supplied)

In *Amalgamated Ass'n* v. *Wisconsin Employment Relations Board,*[40] the Court made it clear that not even the most pressing state interest would open the door to state regulation of peaceful strikes for higher wages. It invalidated a Wisconsin statute prohibiting strikes and lockouts and requiring compulsory arbitration in connection with certain disputes involving public utilities. The Court's opinion, by Mr. Chief Justice Vinson, not only relied on the conflict between the Wisconsin regulation and the federal protection of the right to strike for higher wages but also urged that Congress by imposing certain restrictions on strikes "closed to state regulation the field of peaceful strikes in industries affecting commerce."[41] It was, however, not clear whether the Court was suggesting the complete ouster of state power over peaceful strikes even in the absence of an encroachment on protected activities.[42]

The dissenters urged weighty objections against the Court's holding: The states had traditionally subjected utilities to broad and special regulation not applicable to other industries. There was nothing in the federal act which implied the ouster of state power to deal with emergencies "economically and practically confined within a state."[43] On the contrary, the federal provisions for national emergency strikes implied state power to deal with comparable local situations

beyond the reach of those provisions.

It should be noted that the Court's sanction of state power over "violence" on the picket line was a sharp contrast to the denial of state power to maintain the flow of essential services.[44] Plainly, a breakdown in such services could enormously increase and complicate the problem of preserving order. Furthermore, such a breakdown posed at least as serious a problem for local authorities as a breach in the etiquette of picketing.

The considerations supporting state competence over public utility disputes, regardless of their persuasiveness, were irrelevant under the formula approved in *O'Brien*. Adherence to that formula would achieve a measure of predictability, but the formula plainly had the defects of its virtues. It necessarily excluded any attempt to balance the interests at stake, such as the nature and importance of the state interest involved, the impact of the challenged state regulation on the principal objectives of the national scheme, the significance of the regulatory gap left by the ouster of state regulation and the inapplicability of comparable national regulation to a local problem which local authorities reasonably considered to be acute. The exclusion of such considerations meant that an abstract formula became controlling despite the fact that such a formula could not be supported in terms of either a plainly expressed legislative purpose[45] or the consequences produced in concrete situations.

Federally Prohibited Activities

Where state preventive remedies reached activities which were (or might be) prohibited by federal law, the Court ousted state power on the basis of three interrelated considerations: (1) State enforcement of parallel prohibitions would interfere with centralized and expert administration of the national act by the NLRB and would create the "conflict" inherent in overlapping remedies and successive state and federal adjudication of the same conduct; (2) the line between protected and prohibited conduct is so indistinct that state regulation of conduct which might be proscribed by the LMRA involved the risk of curtailing activity which might be protected under the federal act; (3) the federal act by regulating only certain forms of conduct implied that related forms of conduct were to be free from other sources of restraint. It should be noted that the denial of state power involved only injunctive or affirmative relief for peaceful conduct and that different questions are raised both by state injunctions against violence or intimidation and by state damage actions whether for violent or peaceful activity.

The exclusion of parallel state relief began with *Plankinton* v. *Wisconsin Employment Relations Board.*[46] The Court, in a cryptic *per curiam* opinion,[47] invalidated a Wisconsin order requiring an employer to reinstate an employee with back pay because of a discriminatory discharge which had violated both the Wisconsin Act and the LMRA. In a later case, the Court chose to explain *Plankinton* on extremely broad grounds, stating:

> Section 7 of the Labor Management Relations Act not only guarantees the right of self-organization and the right to strike, but also guarantees to individual employees the "right to refrain from any or all of such activities," at least in the absence of a union shop or similar contractual arrangement applicable to the individual. Since the N.L.R.B. was given jurisdiction to enforce the rights of the employees, it was clear that the Federal Act had occupied this field to the exclusion of state regulation. *Plankinton* and *O'Brien* both show that states may not regulate in respect to rights guaranteed by Congress in Section 7.[48]

Thus, *O'Brien*,[49] which had denied state power to curtail Section 7 rights, was assimilated to a decision barring state power to enforce those rights.

In *Garner* v. *Teamsters Union*,[50] the Court unanimously indicated that state jurisdiction over peaceful strikes, picketing, and boycotts was completely foreclosed without regard to whether state regulation conflicted with, coincided with, or supplemented, the federal scheme. *Garner* has become the dominant case in preemption litigation. For that reason and because of its obscurities, it merits extended discussion.

In *Garner*, the Teamsters had picketed a trucking company, apparently for recognition. Although the company had not objected to unionization, the Teamsters had recruited only four of its twenty-four employees before the picketing began. The picketing, which had resulted in a drastic decline in the company's business, had been enjoined as a violation of the Pennsylvania Labor Relations Act. The Pennsylvania Supreme Court had reversed on the ground that the alleged union conduct also constituted a federal unfair labor practice and that the federal remedy was adequate and exclusive.[51] One dissenter had rejected this position for practical reasons, namely, that the federal remedy was inadequate because the slow processes of the national board could not prevent imminent and irreparable harm to employers. The Supreme Court affirmed the denial of state jurisdiction in an opinion by Mr. Justice Jackson.

The Court cited *Briggs-Stratton* (also written by Mr. Justice Jackson) with approval but put it aside on the ground that *Garner* did not involve "injurious conduct" which either is "governable by the State or . . . is entirely ungoverned."[52] The Court emphasized that the national statute in language almost

identical to that of the Pennsylvania provision had proscribed the union coercion involved. Nevertheless, the Court explicitly refrained from finding a violation of the federal act on the ground that such a finding would invade the primary jurisdiction of the national board.

The emphasis on the probable illegality of the union's conduct together with the continued vitality given to *Briggs-Stratton* suggests that *Garner* may be narrowly interpreted as merely invalidating state regulation which parallels the federal act. Indeed, it was so interpreted in *Weber* v. *Anheuser-Busch, Inc.*[53] and in *United Const. Workers v. Lauburnum.*[54] It may be noted in passing that the Court's suggestion that a federal violation was involved was not justified by the record tested by the Board's precedents.[55]

Under the narrow interpretation of *Garner,* union action, if it were classified as neither protected by Section 7 nor prohibited by Section 8, of the LMRA, would be subject to state power, in accordance with the *Briggs-Stratton* dictum. State boards and courts would determine the facts, and if they classified the conduct involved as "ungoverned" by federal law, would apply state law. The propriety of this classification, on which state jurisdiction would turn, would be subject to ultimate review by the Supreme Court.

Such an interpretation is, however, inconsistent with other passages in *Garner.* Thus the opinion emphasizes throughout the importance of preserving the national board's primary jurisdiction. It was this consideration which caused the Court to refrain from directly ruling on the legality of the union's conduct under the national act. But if the Court is unwilling to make such determinations prior to action by the NLRB, it plainly could not dispose of the federal questions raised by a claim that state action had impinged on either prohibited or, indeed, on protected conduct. The Court could thus prevent such state encroachment only by ousting the states of power over conduct "ungoverned" by federal law as well as over conduct federally prohibited or protected. In other words, the states would be denied any power over peaceful activities in the context of labor-management relations.

This comprehensive ouster of state power was, moreover, implied by language in *Garner* which suggested that for the purpose of determining state power there were only two relevant categories of conduct, namely prohibited and protected. Thus the Court stated:

"*The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint.* For the policy of the national Labor Management Relations Act is not to condemn all picketing, *but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing.* For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal act prohibits." [Emphasis added.][56]

The implication of the total ouster of state power, in the passage just quoted, is plainly incompatible with the result and the approach in *Briggs-Stratton,* where, it will be recalled, the Court appraised the union conduct prior to a Board determination and granted the same latitude to a state agency. But the *Garner* opinion cited and summarily "distinguished" *Briggs-Stratton.*

Weber v. *Anheuser Busch*[57] deepened the uncertainties produced by *Garner. Weber* arose from an old work assignment dispute between the International Machinists and the Millwrights (affiliated with the Carpenters). During negotiations for a 1952 contract, the Machinists had requested that the company agree to give certain repair work on its machinery only to contractors under contract with the Machinists. A similar clause had been in and out of the earlier agreements, with its status presumably dependent on the company's response to the pressures of the rival unions. In the 1952 negotiations, the Carpenters' protests led the company to reject the Machinists' demand. The Machinists thereupon struck and picketed the company's premises. A detailed statement of the subsequent litigation will highlight the uncertainties and the practical difficulties which preemption issues have created both for state tribunals and litigants.

The company promptly charged before the NLRB that the Machinists had violated one of the subsections of Section 8 of the LMRA (Subsection 8(b)(4)(D)). Seven months later, the NLRB quashed a notice of hearing on the ground that there had been no violation of that subsection. Somewhat less than two weeks after its resort to the NLRB, the company sought a state court injunction, alleging that the Machinists had violated the common-law prohibitions against secondary boycotts as well as three provisions of Section 8 of the LMRA: (8) (b) (4) (A) (B) and (D). After the issuance of a temporary injunction the company amended its complaint by charging also that the Machinists had been guilty of restraint of trade in violation of the Missouri common law and statutes. More than a year after the NLRB had determined that 8 (b)(4)(D) had not been violated, the Missouri Supreme Court upheld the permanent injunc-

tion. The United States Supreme Court reversed in an unanimous opinion by Mr. Justice Frankfurter.

The Court referred to the possibility that the Machinists, as alleged by the company in the state courts, had violated Section 8 (b)(4)(A) and (B) of the LMRA. Those possibilities, the Court emphasized,[58] had not been ruled on by the NLRB, which had negatived only the alleged violation of a different subsection. If the Board had also ruled against a claimed violation of the other subsections, "we would have a different case."[59] But *Garner* had indicated that the hypothetical case would not be different since *Garner* had suggested that conduct free from federal regulation could not properly be subject to state restrictions.[60] The hypothetical case would be different only if the Court rejected the intimation in *Garner* that federal prohibitions of certain conduct implied that other conduct was to be free from state restraints. And there is language in *Weber* which suggests that preemption will operate only when the conduct involved is (or may reasonably be deemed to be) federally prohibited or federally protected against employer reprisal.[61] *Weber* may thus be read as recognizing state power over cases involving conduct which is *clearly* not protected and *clearly* not prohibited, i.e., *Weber* curtails somewhat the state competence sanctioned by *Briggs-Stratton*[62] but extends it beyond the narrow limits suggested by *Garner*. This interpretation gains additional support from the Court's sympathetic reference to the difficulties surrounding state court determination as to the protected or prohibited character of concerted activities. Such difficulties would exist only if the states retain some jurisdiction over conduct which falls within the intermediate category.

The uncertainties and difficulties generated for state courts and for counsel by these cases scarcely need elaboration. Notwithstanding *Garner*, state competence may survive if rulings by the national board negative every possibility (or every reasonable or plausible possibility) that the conduct complained of is prohibited by federal law. But even such rulings will not destroy the possibility that the conduct involved is protected. And perfect avoidance of that possibility appears also to require an adjudication by the national board that the conduct complained of is not protected. But the Board's dismissal of a charge, although it generally discloses that the conduct is not prohibited, at least by the statutory provision specifically invoked, does not necessarily disclose whether the conduct is protected. There is, moreover, no possibility of securing a Board adjudication as to whether many significant and questionable forms of union pressure are "protected." The category of protected conduct has, as indicated above, been elaborated under the NLRA and the LMRA for the purpose of insulating certain forms of concerted employee action against employer interference and reprisal. The NLRB is, accordingly, not faced with the need of adjudicating whether particular conduct is protected unless an employment relationship and employer interference with such a relationship is involved. Where, however, as in *Garner*, stranger picketing is involved, the concept of activities protected by Section 7 is not directly applicable.[63] If a few employees had participated in minority picketing and had been discharged, a Board ruling as to whether their conduct was protected would presuppose the filing of a charge that the discharge was unlawful and would usually involve such delay as to make any theoretical state preventive jurisdiction valueless for most practical purposes.

Total ouster of state power has been urged as a method for escaping from the difficulties and uncertainties resulting from case-by-case determination of state competence and as appropriate for two other related reasons: First, the prohibitions of the federal act have struck a balance between contending forces. Congress in determining what was to be prohibited was also concerned with conduct which was to be free. Accordingly, additional state limitations on freedom of action through prohibitions on unions or employers would destroy that balance and would therefore be inconsistent with the federal policy.[64] Secondly, the uniform regulation of labor relations which can be achieved only by the ouster of state regulation would be desirable as a matter of policy.

The balance metaphor, considered alone, assumes the critical question, i.e., whether it is reasonable to impute to Congress the purpose of completely preempting state power. As the most detached advocates of complete preemption concede, there is no clear evidence of such a purpose.[65] On the contrary, it is extremely unlikely that the architects of Taft-Hartley sanctioned such a far-reaching alteration in the federalist balance or would have done so if the question had been plainly put. They were, after all, essentially "states rights" in their basic philosophy. Furthermore, when the issue of state power was raised on the floor, debate generally appeared to be based on the assumption that state power survived.[66] Finally, the architects of the act were astounded by some of the results wrought in the name of the legislative purpose.[67]

In view of the inconclusiveness, to say the least, of the legislative history, the obliteration of state power would appear to be justified only by strong considerations of policy. Even if agreement could be reached on the existence of such considerations, there would, of course, be questions as to whether the

Court should maintain state power until Congress plainly calls for its obliteration.

The case on policy grounds for comprehensive preemption emphasizes the following considerations:[68]

(1) State power may frustrate the working out of the national policy. Labor relations are part of a continuous human relationship; intervention at one point inevitably affects the whole process.

(2) State competence would destroy the uniformity and convenience which are part of the justification for national legislation. It would invite competition among the states in drafting "pro-management laws" as a magnet for the location of industry.

(3) It is desirable to avoid the fine lines of distinction inherent in the preservation of some areas of state competence.

(4) The federalist values of local autonomy, diversity and experimentation can be fostered by withdrawing the labor relations of smaller enterprises from the NLRB's jurisdiction and leaving their regulation exclusively to the states.

Appraisal of such considerations will obviously involve judgments or predilections about the contemporary role of state power, as well as judgments about the coherence and gaps in the particular federal legislation which is urged as the basis for state supersession. There is plainly no formula which will yield the proper appraisal. Several general comments may, however, sharpen the issues involved. In a society with a federalist tradition, the "uniformity" which is part of the justification for federal regulation consists of two extremely different kinds of uniformity. First is the uniformity which results when the national power is exercised to enforce minimal standards of conduct within the sphere of the national interest. Secondly, there is the uniformity which can be achieved only by an exclusive system of national regulation. The first type of uniformity plainly does not theoretically involve total preemption of state power; for regardless of whether or how the states act, they are precluded from abrogating the minimum national standards. In practice, there will, of course, be acute controversy as to whether particular state regulation "conflicts" with such standards. And to the extent that the states were in error as to the existence of "conflict," interference with the national power would result pending appellate correction of state determination. But unless federal regulation in any context is, contrary to our tradition,[69] to destroy state competence, in each case the values of preserving "consistent" state power, i.e., the values of federalism, must be balanced against the danger of deranging the federal scheme. The fact that different aspects of labor relations are interrelated does not materially help in striking that balance because similar interrelationships exist in connection with almost any activity subject to federal regulation.

Nor does the objective of excluding competition among state legislatures in the enactment of "pro-employer legislation" justify total state preemption. This question cannot usefully be decided as an abstraction without regard to gaps in the federal scheme and to whether supplementary state legislation may give coherence to an interstitial federal scheme. Furthermore, the objective of avoiding competition through variations in state law could be achieved only by displacing a vast body of state law of general application which impinges on labor relations. Even the most ardent preemptionists shrink from the regulating gaps flowing from such an attrition of state power.[70] Nevertheless, general regulations, for example, laws concerning safety, health, maximum hours for women, and hiring practices, probably have at least as strong an impact on inter-state rivalry for new businesses as does the regulation of activities neither prohibited nor protected by the national law. The same point may be even more important in connection with differences in local taxes. Finally, competition through legal differences which are compatible with nationally prescribed minima is merely another way of describing the characteristic values, complexities, and costs of a federal scheme.

No one who has wrestled with the Court's decisions in this area can be unsympathetic to the objective of reducing "fine lines of distinction." At the same time, no one bred in the common-law tradition can ignore the need for discriminating distinctions directed at achieving some rational development of statutory and social purposes. Whether particular lines of distinction will succeed in achieving such purposes or whether they are worth the cost are debatable questions. But able commentators, such as Professor Cox, who have espoused a broad preemption of state power, in part to avoid fine distinctions, have nevertheless proposed limitations on preemption, which necessarily involve such distinctions.[71] Such limitations make it clear that our system has recognized other values beyond the quiet life for the judge or lawyer.

Finally, an attempt to compromise between the uniformity which flows from a single source of regulation and the diversity of the federalist idea, by according to the states exclusive control over the labor relations of smaller enterprises, is not without its difficulties. It may be a rough and ready way of exempting small businesses from the burdens of federal regulation and, at the same time, reducing the regulatory burdens of the national government. But such exemption frequently ignores that the fundamental purpose of national regulation is to insure the observance of minimum standards where the national interest is

involved. The size of a particular business—or of its interstate transactions—is plainly a mechanical formula for determining the existence of the national interest and the need for national regulation. A more significant inquiry is the extent to which a class of small businesses are subject to the abuses which the national law is designed to suppress.[72] In this connection, it is significant that in debating the Taft-Hartley Act, Senator Taft expressed special concern about the abuses existing in the labor relations of small enterprises.[73] More recently, the McClellan Committee has dramatically documented the genuine basis for such concern. Under such circumstances abdication of national power on the ground that each enterprise is small and without regard to the cumulative effect of the relevant abuses, may well involve a perverse surrender of national objectives.

Such surrender will not, moreover, fully achieve the local diversity and experimentation which the federalist tradition is designed to promote. The problems of small enterprises are not the same qualitatively as those of larger entities. Thus, to take only one example, a strike in a small enterprise will rarely give rise to a local emergency. Consequently, state competence over small enterprises would not promote the experimentation with arrangements which might improve our not altogether satisfactory methods for dealing with disputes which threaten the welfare of local communities or of the whole country.

These somewhat general observations are re-enforced by regard for the character of and the contrast between (a) state regulation bearing on labor relations and (b) the LMRA. State regulation (preemption aside) theoretically constitutes a complete system, with the capacity for growth and adaptation inherent in a mixed statutory and common-law system. It includes, as indicated above, regulation, such as labor relations statutes, tailor-made for labor-management problems. It also includes regulations, such as fair employment practices and safety rules, pinpointed at the employment relation without regard to whether that relation is subject only to the discipline afforded by the market or to collective bargaining as well. It includes also general tort and contract doctrines and general regulation, such as antitrust and transportation regulation. The application of such general standards to labor relations will reflect in varying degrees the distinctive elements of labor-management relations.

The substantial problems involved in classifying various kinds of state regulation and in integrating them with the national scheme will be considered below.[74] Here it is sufficient to note that uniformity in the regulations controlling labor relations could be achieved only by displacing a vast body of state regulation directed at ends and embodying values not explicitly dealt with in the LMRA or its legislative history. The regulatory vacuum which would result from such a single-minded pursuit of uniformity is so extensive and so incompatible with the federalist tradition as to reinforce the doubts expressed above concerning the desirability of seeking the uniformity which results from an exclusive system of federal regulation.

These doubts are also reinforced by a consideration of the substantive and remedial gaps in the LMRA. which are so serious as to threaten the basic objectives of the national scheme. The ouster of state power, without regard to whether it advances or retards these objectives, thus may in concrete situations involve a doctrinaire application of the supremacy clause, which perversely rejects the aid of the states in the achievement of basic national purposes.

The federal-state adjustment with respect to stranger and minority picketing is a useful illustration of such perverse results. Until the relatively recent decision in *Curtis Bros.*[75] the NLRB's position was that stranger or minority picketing for recognition was not a violation of the LMRA. As a result, an employer subjected to such picketing was faced with a Hobson's choice: He could recognize the union, thereby violating the national act; or he could obey the national law and withhold recognition, thereby in many cases risking the strangulation of the enterprise by picketing. Prior to *Curtis*, the federal law thus prescribed certain standards while denying protection against conduct deliberately designed to inflict damage for the purpose of inducing a violation of the governing standards. It is not easy to see the basis for denying to the states the power to avoid so grotesque a result, by enjoining the picketing in question.[76] Such relief would plainly implement a fundamental policy of the national scheme, namely that the bargaining agent should have uncoerced majority support and that individual employees, absent such support, should be free to bargain for themselves.

It is true that once the states were permitted in the first instance to decide what regulation was a consistent supplement to the federal scheme, error, deliberate or inadvertent, was possible. But such errors could have been cured by judicial review. Furthermore, where state injunctions restrained protected activity, the power of the NLRB to restrain their enforcement could have been developed, thereby expediting curative relief.[77] The mere possibility of such errors, under the preemption approach, precluded the exercise of state power to curb an abuse which threatened both national purposes and important local interests.

There is no calculus for weighing the danger of such

errors against the difficulties resulting from the destruction of state power to redress the anomalies and gaps of the federal law. But it is at least appropriate to refer to the familiar danger that "uniformity" and "expertise" and "primary jurisdiction" may become shibboleths which divert attention from the question of whether state power is deranging or promoting federal purposes.

State Competence over "Violence," Intimidation, etc.

"Violence" as used in this context, is a comprehensive term encompassing a broad variety of conduct. It includes not only the application of physical force to persons and property but also threats of force explicit or implicit in activities such as mass picketing, and verbal abuse so sustained and provocative as to involve the prospect of violence against or by the objects of such abuse.[78] In view of the controversy as to the proper etiquette for the picket line and the wide range of activities connected with picketing, characterization of conduct as "violent" or "peaceful" may involve both subtle issues of judgment and the risk that the state may lay hands on conduct which the national board might find to be protected.

The Court's validation of state power over violence despite such risks has been a sharp contrast to its approach in *Garner* and *Weber*. The Court has indicated, without dissent, that state criminal sanctions for violence, incitement to violence, and intimidation are not displaced by the LMRA.[79] Similarly there appears to be agreement that civil actions, such as personal injury suits, for what may be termed the direct consequences of violence are unaffected by the LMRA.[80] The fighting issues have involved the validity of both state injunctions against violence and damage remedies for what may be called the indirect consequences of violence, e.g., loss of profits by an employer or loss of pay by employees resulting from union threats and intimidation which prevented willing employees from working. As to these matters, a majority of the Court has recognized state competence, over the consistent dissent of Mr. Justice Black and Douglas, who have been joined intermittently by Mr. Chief Justice Warren.

The dominating case in *United Construction Workers v. Laburnum*.[81] In *Laburnum*, the Court, with Mr. Justice Douglas and Black, dissenting, sustained an employer's recovery of compensatory and punitive damages against a union. The employer, while under contract with an A. F. L. union, had rejected the recognition demand of the defendant-union, which had lacked significant employee support. Thereupon, the defendant, to secure its demand, had resorted to a campaign of violence and intimidation against the employees involved, thereby forcing the employer to abandon several construction projects. The state award to the employer for the resultant damages rested on the ground that the defendant had tortiously interfered with the plaintiff's advantageous relationships.[82]

Although the Court assumed that the defendant had violated Section 8(b) (1) (A) of the LMRA, it rejected the contention that *Garner* foreclosed state action. Its opinion relied principally on three separate, if interrelated, considerations: (1) "Here Congress has neither provided nor suggested any substitute for traditional state court procedure for collecting damages for injuries caused by tortious conduct."[83] (2) The legislative history showed plainly that federal proscription of violence was not designed to oust state law.[84] (3) Under common law tort principles, unorganized persons would have been liable for the loss caused by similar violence; the union, which the Court observed, had lacked any contractual relationship with the plaintiff or its employees, was not immunized against similiar liability.[85]

The last ground, together with the Court's supporting citations,[86] has been read as an acceptance of the view that the preemption cases do not oust state laws of general application, as opposed to labor regulation as such, even though such general laws are applied to non-violent conduct involved in a labor dispute.[87] Before examining that interpretation, it is convenient to consider the post-*Laburnum* decisions concerning state power over violence.

In *United Auto Workers v. Wisconsin Board*, (the "*Kohler*" case)[88] the Court upheld an order of the Wisconsin Employment Relations Board restraining violence and mass picketing, even though the order had been based on a state labor relations act and had granted a remedy available under the federal act. In *Kohler*, the Chief Justice, who had been with the majority in *Laburnum*, joined Mr. Justice Douglas and Black in dissent.

The Court explicitly disclaimed any concern with whether Wisconsin acted through its courts (enforcing a general policy against violence) or through its labor board (enforcing a policy pin-pointed at labor-management relations). The decisive consideration was: "The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling directions to that effect."[89]

In *Youngdahl* v. *Rainfair*,[90] the Court held that conduct which threatened to develop into, or to provoke, violence was also subject to state injunctive power. In that case, employees struck and picketed

to secure recognition of a union as bargaining agent. Although it was not clear whether the union had had majority support,[91] the number of strikers, at all times fell short of a majority of the employees.[92] The strike was accompanied by threats against the plant manager and other forms of misconduct, such as the scattering of tacks on the company parking lot and on the driveways of non-strikers. After about two weeks, the recognition strike and picketing ended. About a month later the strike and picketing resumed as a protest against the employer's denial of recognition to the union and his refusal to reinstate the strikers. In its second phase, the strike was accompanied by some acts of violence and by mounting tension caused in part by sustained and provocative abuse which the strikers directed at the non-strikers. According to the findings of the Arkansas courts, the strikers' conduct was calculated to provoke violence and was likely to do so unless restrained. Arkansas had restrained the strikers and the union representatives from engaging (1) in threats or intimidation of non-strikers, obstruction of the streets, etc., and (2) all picketing. The Court, by Mr. Justice Burton, sustained the first phase of the injunction (with the Chief Justice and Mr. Justice Black and Douglas dissenting) but invalidated the injunction insofar as it restrained peaceful picketing, an an encroachment of "the preempted domain of the National Labor Relations Board."

In sustaining Arkansas' power to prevent prospective violence, the Court necessarily rejected the contention that the strikers' conduct was protected.[97] This determination marked the first occasion since *Briggs-Stratton* in which the Court overcame its unwillingness to rule in the first instance on the protected character of conduct where NLRA precedents created doubt as to its proper characterization.[94] This approach may well be confined to the context of actual or incipient violence. Nevertheless, *Rainfair* reinforces the possibility that state jurisdiction to enjoin peaceful conduct unprohibited and unprotected by federal law may still survive, in accordance with the *Briggs-Stratton* rationale.

In *International Union, United Automobile Aircraft and Agricultural Implement Workers v. Russell*,[95] the Court recognized state power to grant to individual employees remedies similar to the employer remedies which had been sanctioned by *Laburnum*. In *Russel*, the Court (with Mr. Chief Justice Warren and Mr. Justice Douglas, dissenting, and Mr. Justice Black not participating), sustained an Alabama verdict, requiring a union to pay compensatory damages of about $500 (for lost pay) plus $10,000 in punitive damages, to a non-striking employee (Russel) whose entry into a strike-bound plant had been blocked by mass picketing and threats of violence. The damages had been based on the union's having committed the tort of wrongful interference with a lawful occupation.

The Court assumed, *arguendo*, that Section 10(c) of the LMRA authorized the NLRB to award lost pay to Russel, notwithstanding Board precedents disclaiming such remedial power.[96] The assumed availability of such compensatory relief, the Court conceded, differentiated *Russel* from *Laburnum*, where the Board had lacked authority to make the employer whole. The Court declined, however, to make this difference decisive, for the following reasons: Congress had not established "a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct."[97] The primary legislative purpose had been "to stop and prevent unfair labor practices;" the Board's power under Section 10(c), to compensate for lost pay was incidental to a scheme of dominantly preventive relief.[98] Lost pay, even for victims of unfair labor practices, was not a matter of right but depended on the Board's discretion.[99] The overlap of federal and state compensatory remedies did not create the "conflict of remedies referred to in *Laburnum*."[100] Previous preemption cases reflected only a concern that "one forum would enjoin as illegal conduct which the other forum would find legal or that the state courts would restrict the . . . rights in this connection guaranteed by the Federal Acts."[101]

The dissenters urged, first, that under the majority's assumption that compensatory relief was provided by the LMRA, there was a duplication between federal and state remedies, which was inconsistent with the rationale of *Garner*. The dissenters did not, however, rest on the assumed scope of the Board's remedial authority. They adopted an extremely broad view of federal preemption under which the current federal regulation would deny the states power to grant damages for the indirect economic consequences of violence even though the NLRB also lacked such power. They stated: "The Federal Act represents an attempt to balance the competing interests of employee, union and management. By providing additional remedies the States may upset that balance as effectively as by frustrating or duplicating existing ones."[102] Such remedies, varying especially in their punitive aspects from state to state, would destroy the uniform scheme of national regulation which the LMRA was designed to achieve. The threat of varying damages was also inconsistent with the statutory objective of promoting industrial peace. The prospect of lucrative punitive relief would deter recourse to the "curative" federal machinery, and private litigation would, as the dissent in *Laburnum* had emphasized, drag on, "keeping old wounds open."[103] This language can scarcely be reconciled with the result or the rea-

soning in *Laburnum*, a decision in which the Chief Justice, who spoke for the dissenters, had joined.

The dissenters, sensitive to the difficulties posed by *Laburnum* and unwilling to distinguish it by conceding the Board's authority to award lost pay, pointed to three other grounds of distinction: (1) Since an employee's abstention from concerted activities is protected by Section 7 of the LMRA, the union's interference with the non-striking employees in *Russel* directly and inherently involved a violation of Section 8(b)(1)(A), whereas that subsection was involved only "fortuitously" in the union's interference with the employer's interest in *Laburnum*. (2) Since the defendant union in *Russel* had been the certified bargaining representative, its conduct was an incident of an ordinary economic dispute which would, presumably, be followed by continuing labor-management relations. In *Laburnum*, per contra, the defendant union had been a stranger attempting to displace an incumbent union by "predatory" coercion of both the employees and the employer. There was, accordingly, no prospect of continuing relations between the litigants and no need to consider the possibility that litigation might prejudice such relations. (3) Finally, in *Laburnum*, only one plaintiff, the employer, could recover punitive damages, whereas, all of the many employees affected by the conduct in *Russel* could successively recover punitive damages, a prospect aggravated by the Alabama rule that evidence of a previous punitive recovery was inadmissible in a subsequent action.

There are obvious difficulties in reconciling the broad positions of either the majority or the dissent with the Court's precedents; both opinions, moreover, give rise to difficulties because they proceeded on different assumptions regarding the NLRB's remedial authority. The majority's distinguishing of *Garner* and related cases solely on the ground that they involved preventive, rather than damage, relief is questionable. State damage actions, like injunctions, enforce policy and control conduct, albeit somewhat more indirectly.[104] They involve, moreover, the possibility of the same kinds of conflict which the broad language of *Garner* was apparently designed to suppress.[105] Thus, states purporting to apply substantive standards identical to those embodied in the federal scheme may reach different results in particular cases because of diverse attitudes and procedures. State damage remedies may, moreover, be imposed for conduct which might be held protected under the federal scheme, and the possibility of such awards would operate to restrain activities which the LMRA, as previously interpreted by the Court, was said to free from all restraints. Where an adequate compensatory remedy is supplied by the federal act, it is not easy to see any special justification for running the risks of state adjudications which would overlap or conflict with the federal scheme.

Nor is any convincing argument for such state action (given the premises of *Garner*) supplied by the Court's attempt to minimize the importance of the compensatory remedy which it assumed was provided by the LMRA. Even though damage remedies under the LMRA are "incidental" to a scheme of dominantly preventive relief and even though they are entrusted to the Board's discretion, these considerations do not affect the impact of the Board's compensatory powers on conduct or the potentiality of conflict between state and federal action. Indeed, in many situations, it is the fear of back pay liability which is the decisive deterrent to unfair labor practices since the NLRB's purely preventive processes give wrongdoers one free bite.

In view of the presence of violence in *Russel*, the Court's broad distinction between damage and injunctive relief was plainly not necessary for the decision. Violence and related conduct, as *Garner*[106] and other cases suggest,[107] present a special case. The paramount responsibility of the states for dealing with violence, the importance of recognizing power adequate to responsibility, and the pertinent legislative history,[108] appear to justify the recognition of state power over actual or incipient violence despite a potential overlap or conflict between state and federal regulation.

The Court in *Russel* did not, however, clearly treat violence as a special case. Its narrow reading of previous preemption cases may be interpreted as a general authorization of state damage actions without regard to whether violence is involved or to whether such actions are necessary to fill remedial gaps in the federal scheme. Such state power would naturally be limited so as to exclude encroachment on protected activities. It should be observed, however, that the opinion, by stressing the "kind of conduct . . . involved,"[109] suggests that the limitation on *Garner* may be confined to situations involving violence.

The question of whether that limitation should be expanded generally to cover all actions for damages, as opposed to injunctive relief, can be more conveniently explored below. At this point, it is sufficient to note that the special history and characteristics of the injunction in labor disputes might serve to justify a distinction, for preemption purposes, between damage and injunction cases, respectively. Labor's hostility to the labor injunction resulted in part from the fact that the consequences of an erroneous injunction often could not be reversed by a successful appeal because changes in the circumstances underlying the dispute precluded effective reinstatement of strikes or picketing. A reversal of erroneous damage awards would,

however, come closer to restoring the status quo.

As for the dissenting opinion, its major premise that any additional state remedy would destroy the balance in labor relations which Congress sought to create, involves a somewhat cavalier treatment of both the legislative purpose imputed to Congress by *Laburnum* and the underlying questions of policy. Congress, according to *Laburnum*, had been unwilling to oust state remedies for violence and had not in that connection suggested a distinction between state damage remedies for violence, as such, and its economic consequences.

There are, moreover, strong considerations against such fragmentation of state competence—considerations which are particularly forceful if, as the dissenters apparently assumed, the federal scheme does not provide for compensatory relief in the *Russel* situation. The primary responsibility of states for dealing with violence is a familiar aspect of our federalist tradition. For this purpose, "civil responsibility and public punishment by common usage have long been established as appropriate and complementary associates."[110] Indeed, in labor disputes, civil liability is often a more effective deterrent than the criminal law. Prosecutors may be reluctant to take action because of inertia, sympathy with the strikers, or political indebtedness to the interests involved. Juries may be unwilling to convict individuals whose wrongdoing occurred in the surcharged atmosphere of a labor controversy but may be willing to grant compensatory relief against an impersonal association. Such reluctance may be especially strong when violence has not actually erupted but, as in the case of mass picketing and related techniques, is implicit in the total situation. An assumption of a "federal balance," which gains no support either from the legislative history or from the general traditions of federalism scarcely justifies the denial of state power to employ civil actions as a device for deterring violence and compensating its victims.

The dissenters' argument, pushed to the limits of its logic, would not merely fragment state power over violence in labor disputes but would destroy it completely. State criminal statutes, if they are enforced, involve dangers similar to those implicit in civil remedies. They bring diverse local attitudes and procedures to bear on conduct occurring in the context of labor controversies. They also involve the risk that activities which might be protected under the national scheme might be made "too risky to undertake." Furthermore, the institution and prosecution of criminal actions may also poison a continuing relationship. In short, the considerations urged by the dissenters to support the ouster of state civil remedies—regardless of the remedial deficiencies of the federal scheme—equally support the ouster of state criminal sanctions.

The basic difficulties with the dissent arise, in my opinion, from a one-sidedness in striking a balance between the interests at stake. The dissenters appeared to be so preoccupied with a contingent and remote limitation on the union's protected activities that they gave inadequate attention to the actual and direct interference with Russel's protected activities, which resulted from the union's violations of both federal and state law. Presumably, it was this one-sided emphasis which led the dissenters to urge in effect that measurable economic loss deliberately inflicted by violence and intimidation should at present not be compensable under either system. Such a self-defeating jurisprudence, which might be read as an encouragement to violence in the context of labor-management relations, would scarcely promote the search for orderly adjustments in that context or other contexts where law is challenged by force.

A similar preoccupation with a single interest underlies the dissenters' fears that state remedies for violence would disturb a continuing labor-management relationship. The fostering of a proper climate for such relationships is, of course, an important objective of labor policy. But employees and employers as well as unions are parties to that relationship. Disregard of, or inadequate remedies for, union violence against employees or employers may in some situations appear to avoid strains on the tripartite relationship. But in other situations, violent conduct which might have been checked by appropriate deterrents, may also poison the atmosphere.

Whatever the uses and dangers of appeasement in this context, both federal and state law have proscribed violence. The federal act implies, moreover, that the risks of disturbing continuing relationships are the justifiable costs of avoiding abuses by the interests involved. Thus any charge that an incumbent union has violated the LMRA, may disturb such a continuing relationship. Furthermore, Section 301 of the Act confirms liability for breach of collective bargaining agreements, and Section 303, for violations of the restrictions imposed on unions by the provisions of Section 8b(4) of the LMRA. The enforcement of such liabilities is not without risks to continuing relationships. The dissenting opinion does not make it clear why similar risks should become intolerable where liability for the economic consequences of violence is involved.

The dissenters' specific grounds for distinguishing *Russel* from *Laburnum* are in my opinion, no more convincing than their general philosophy of preemption. First, even if the protection against violence afforded to an employee by Section 8(b)(1)(A) is "direct" and the employer's protection "derivative,"

these labels do not suggest that an employee should be deprived of adequate compensatory relief. Indeed, the contrary conclusion seems more acceptable; Congressional preoccupation with employees' rights scarcely warrants the destruction of their compensatory remedies while compensatory state relief for employers is preserved. Secondly, the fact that the defendant-union in *Russel* was certified whereas the defendant in *Laburnum* was a stranger attempting to muscle out the incumbent, although it plainly made the conduct in *Laburnum* more distasteful, scarcely serves as a basis for a legal distinction. It is not easy to see why that fact should destroy all compensatory relief for violence clearly prohibited by federal as well as state law.[111] The argument that state action initiated by the employees might poison the future bargaining relationship ignores, as already indicated, both the prophylactic possibilities of such actions and similar dangers to the continuing relationship implicit in any legal action against unions. In any event, *Laburnum* had declared that Congress had determined that state remedies for violence and its economic consequences should survive. There is nothing in *Laburnum* or in the LMRA which justifies a different result where the violence is committed by incumbent unions.

The final difference between *Russel* and *Laburnum*, the prospect of multiple punitive damage awards in *Russel*, is an appealing basis for distinguishing the cases. But it is difficult to convert that difference into an acceptable basis for a legal distinction however desirable it may be as a matter of policy to exclude punitive damages from this area. If, as *Laburnum* indicated, state compensatory and punitive remedies for violence and its consequences are valid, one of the familiar risks of recognizing state power under a federalist scheme is that it will be exercised harshly or unwisely. But neither the preemption cases nor the commerce clause provide the yardsticks for measuring the validity of successive penalties for conduct which may be, but need not be, considered a single transaction. Other provisions of the constitution, and especially the Fourteenth Amendment, would appear to be more relevant. Furthermore, similar risks of multiple punitive awards exist where an employee brings an action for personal injuries or for the fear, inflicted by violence or the threat of violence during a labor dispute, or where the state charges a union or its officers with multiple criminal offenses. The dissenters, as already indicated, appeared to concede state competence over such actions,[112] including, presumably, competence to grant successive punitive damage awards. Such damage awards, despite differences in the underlying legal concepts, would have substantially the same impact on labor-management relations as the award in *Russel*. It is accordingly extremely difficult to articulate a coherent concept of preemption which would warrant the distinction drawn by the dissent between the two types of awards.[113]

State Damage Actions for Non-Violent Conduct

The uncertainty surrounding state competence in this area is illustrated by the problems presented by the California litigation involving one Garmon as the plaintiff and San Diego Unions as the defendant. In *Garmon v. San Diego Unions*[114] the California Supreme Court upheld a damage award, as well as injunctive relief, against the defendant-union, which had picketed the plaintiff for recognition and a union-shop clause without having any members among the employees involved. The United States Supreme Court reversed the injunction but remanded the damage award, stating that *Laburnum* had involved "an award of damages under state tort law for violent conduct" and therefore presented a "different situation."[115] On remand, the California Supreme Court in a 4-3 decision sustained the damage award.[116] The United States Supreme Court recently granted certiorari.[117]

State competence should, in my opinion, be sustained in situations such as *Garmon*. Stranger or minority picketing for recognition is, as indicated above,[118] incompatible with the basic objectives and provisions of the national law. Although the LMRA, as now interpreted by the Board, proscribes such conduct, it does not afford employers a compensatory remedy for the economic losses which are the object and the result of the union's conduct. Consequently, it is only the states which can now provide adequate compensation for the deliberate infliction of economic loss by conduct which violates both state and federal law. Furthermore, the delay surrounding preventive relief through the processes of the national board increases the need for civil liability as an adjunct to the Board's preventive relief. These considerations, in my opinion, make the case for state competence in the *Garmon* situation even stronger than in the *Russel* situation where the Court assumed that the federal law provided adequate money damages and where the complication of multiple claims for punitive damages existed.

Reliance on state awards to implement a federal policy may naturally be attacked as disturbing the federally created balance imputed to Congress. But, as indicated above,[119] this metaphor is question-begging at best. Furthermore, in the context of concrete situations, such as those involving stranger picketing, its application appears to frustrate, rather than to implement, the basic statutory purposes.

The principal consideration against upholding state damage awards in the absence of violence appears to be the greater danger of the misapplication by the state of the criteria for distinguishing between prohibited and protected conduct.[120] Several persuasive reasons' suggest, however, that this consideration does not warrant the destruction of state competence to grant damages for non-violent but federally prohibited activities where such competence is necessary for an adequate compensatory scheme. First, there is a similar danger in the violence context, namely, that of disparate federal and state approaches to vicarious responsibility. A more important consideration is the implication of Section 303 of the LMRA, viz, that Congress was prepared to tolerate such conflict where it was the price of an adequate compensatory scheme. Section 303 expressly authorizes state and federal courts to award damages for violation of Section 8 (b) (4) of the act.[121] The jurisdiction of the courts is, moreover, independent of the Board's. As a result the same conduct may be held to be unprohibited, and impliedly protected, by the Board and yet may be the basis of a damage award in a court action.[122] It is true that to the extent that such conflicts result from different interpretations of the federal statute, state application of Section 303 could be harmonized with federal adjudications by the exercise of the Supreme Court's reviewing power. But the Court could not reach conflicts resulting from reasonable differences in fact-determination. And provisions such as Section 303 which turn on "purpose" are, of course, a fruitful source of such conflicts. Furthermore, the Supreme Court could exercise its reviewing authority to strike down damage awards based on state law if such awards encroach on federally protected activities. Such review would inescapably involve the possibilities of federal and state conflict, but, like the conflict arising from Section 303, which is not fundamentally different, it could be dismissed as the price for adequate remedies against conduct banned by both state and federal law.

Where state damages are assessed for activities which are neither prohibited nor protected, the problems are more troublesome. In this context, there is more force to the claim that state additions to the substantive, as opposed to the remedial law, of labor relations would derange the balance struck by the federal act. But in appraising that assertion the reasons for denying group activities the protection of the statute must be considered. As already indicated, such protection is in general denied because the conduct involved is deemed incompatible with the objective of the LMRA, or some other federal statute, with notions of mutual responsibilities of employer and employee, or because the unprotected conduct invades an employer interest considered paramount.[123] The fact that such marginal activities are denied the statutory protection may be read either as a declaration of national neutrality with respect to supplementary state power or as a declaration that the states also should abstain from regulation these marginal activities.

The general problems underlying the choice involved have been discussed above.[124] It may, however, be useful to illustrate these problems by reference to a concrete situation. A union may picket or exert other pressures to obtain recognition despite the fact that a rival union also is claiming majority status and the Board is processing the representation question. If an employer grants recognition because of the picketing, he violates the LMRA. If, in obedience to the national law, he withholds recognition, he runs the risk of substantial losses as a result of the union's pressures. The national board, pending an election, presumably cannot enjoin the picketing;[125] in any event, its processes may be too slow to grant effective protection. State injunctive power is subject to the uncertainties flowing from *Garner*. If employees participated in the picketing the employer would, of course, have the theoretical right to discharge them. But that right may be a paper right either because the employer cannot secure employees with requisite skills or because discharge would aggravate a tense situation.

Under the foregoing circumstances, the recognition of state competence to grant damages would serve substantially the purpose which lies behind the characterization of the employee's activities as unprotected, i.e., it would to some extent deter the marginal conduct involved. State damage awards would, moreover, be implementing a central purpose of the national scheme by protecting the integrity of the Board's representation machinery as well as the principle of majority rule. Naturally, if uniformity is postulated as the objective of the national scheme, any state remedy would derange the balance achieved by Congress. But plainly, any such abstract postulate begs the essential question, i.e., whether the national law should be the only source of regulation.

Union-Security Provisions, Internal Union Affairs and Related Matters

The Wagner Act did not affirmatively sanction or prohibit the closed shop or other forms of union-security arrangements. Although the Act was silent about state authority, its legislative history indicated that the states were to retain authority to prohibit or regulate such arrangements.[126] Section 14(b) of the Taft-Hartley Act expressly empowers the states to prohibit union-security arrangements which, in the absence of

state regulation, would be permitted by Section 8 of the statute.[127] The legislative history of that section suggests that its purpose was not merely to sanction state regulations more restrictive than the federal prohibitions but rather to preserve concurrent state regulation without regard to whether it supplemented or overlapped with the federal scheme.[128] In other words, the legislative history indicates that the purpose of Section 14(b) was to preserve for the states the same power to deal with union-security which they had under the Wagner Act.[129]

The Court has, however, not explicitly recognized the unique problems posed by Section 14(b) and the pertinent legislative history. Its early treatment of state power in the union-security area proceeded on the assumption which underlay *Garner*, namely, that overlap between federal and state remedies was fatal to state competence. Thus, as indicated above,[130] *Plankinton, a per curiam* decision, denied state authority to grant affirmative relief from union-security arrangements violating state law where such relief duplicated remedies available under the LMRA. Furthermore, the Court's later explanation of *Plankinton* implied that the states were barred from granting relief of any kind for conduct discriminating against non-union (or union) employees if such conduct constituted a federal unfair labor practice.[131]

The recent *Gonzales* case,[132] introduced new uncertainties concerning state action which involves such a partial or complete remedial overlap. In *Gonzales*, the Court, divided as in *Russel*, affirmed a California decision restoring the plaintiff to union membership from which he had been expelled and awarding him damages for lost pay and $2,500 for physical and mental suffering. In the California litigation, the plaintiff had relied on the doctrine that a union constitution constitutes a "contract"[133] between the union and its membership and had urged that under state law he was entitled to both restoration of membership and damages as a remedy for the union's breach of that contract through wrongful expulsion. The Court, by Mr. Justice Frankfurter, confirmed state power over membership rights—a point conceded by the dissenters and the defendant. Turning to the disputed issue—state power to grant damages for loss of employment resulting from the plaintiff's expulsion—the Court, in sustaining state competence, emphasized three grounds: (1) the crux of the California action was breach of contract; (2) it was desirable to afford the plaintiff a complete remedy for the invasion of his rights and (3) the facts raised doubts as to the availability of a remedy for lost pay, under the LMRA.[134]

Mr. Chief Justice Warren, with whom Mr. Justice Douglas joined in dissent, reiterated the principal points of the *Russel* dissent: erosion of *Garner* and the deterrent to recourse to the "curative" federal machinery flowing from the state award of psychic damages as well as lost pay. The dissent also pointed to the state's duplication of the NLRB's back pay remedy and contended that the interest in a complete equitable remedy did not justify the frustration of both "the remedial pattern of the Federal Act"[135] and the "uniformity of substantive law so essential to matters having an impact on national labor regulation."[136] Finally, the dissent forcefully rejected the significance attached by the majority to the contractual nature of the state action, stating:

> But the presence or absence of pre-emption is a consequence of the effect of state action on the aims of federal legislation, not a game that is played with labels or an exercise in artful pleading. In a pre-emption cast decided upon what now seems to be discarded principles, the author of today's majority opinion declared: 'Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised.' *Weber* v. *Anheuser-Busch.*[137]

There is considerable force to the dissenters' charge that *Gonzales* is inconsistent with the Court's previous declarations, which had implied an ouster of overlapping state remedies regardless of their labels.[138] Nevertheless, several distinctive elements in *Gonzales* invited a departure from, or a reshaping of, earlier pronouncements. First, supervision of internal union affairs has a close functional connection with the policing of union-security arrangements. Indeed, the desire of some members to acquire and to retain union membership results from the fact that membership is often a practical, if illegal, condition of employment. This connection renders somewhat artificial a federal-state allocation which grants the states authority to restore membership but grants to the federal board alone authority to compensate for the economic losses resulting from a violation of the rights of membership.

Such a concept of divided jurisdiction involves obvious obstacles to prompt and adequate relief. State relief confined to restoration of membership is often subject to great delays and uncertainties as a result of the requirement that a member exhaust internal union remedies. An expelled member may, moreover, be reluctant to file a charge with the NLRB out of fear of prejudicing such internal union remedies and being forced to resort to the uncertainties of state litigation. Accordingly, the expelled union member who wishes to remain in a given occupation and to avoid friction with the union leadership may initially resort to internal union remedies. If these are unavailing, his remedy from the Board is subject to the re-

quirement that a charge be filed within six months after the alleged job discrimination occurred, or continued.[139] The delay involved in resort to union remedies and the evidentiary obstacles to showing a continuing violation may create substantial practical difficulties for him. But even if he surmounts these difficulties and secures a Board cease and desist order, that order, without a restoration of membership, may as a practical matter not effectively protect him against future discrimination which will, however, not be amenable to proof.[140] Furthermore, even if the Board's order is effective, an expelled member may wish to have his membership restored for reasons independent of its utility as a defense against discrimination. Thus if he is to vindicate all of his rights despite the union's unwillingness to correct its error, the alternative to the *Gonzales* decision would be two actions against the union.[141] These practical shortcomings of the concept of divided jurisdiction give considerable support to the result in *Gonzales*.

Although that result appears to sanction the overlap condemned in *Garner*, it should be observed that the states' conceded jurisdiction over internal affairs, coupled with the competence sanctioned by Section 14(b), excludes the possibility that damages will be imposed on the basis of standards which involve an encroachment on protected activities. Generally, any job discrimination against an expelled member because of his expulsion will, of course, violate the LMRA and thus will not be protected. But in the event that an expellee suffers economic loss as a result of his expulsion without a violation of the LMRA being involved,[142] state competence over both union-security arrangements and internal affairs would prevent the state action from encroaching on protected activities. Accordingly, there is no basis in the *Gonzales* situation for the fear expressed in *Garner* that state action would impose accountability for protected activities. And where such a possibility does not exist, the interest in avoiding state duplication of the federal remedy is a doubtful basis for limiting the states' general competence over internal affairs.[143]

In this connection, it is significant that in a comparable situation, the possible existence of a Board remedy has not excluded alternative forms of relief by courts. In *Syres v. Oil Workers*,[144] the Court sustained the jurisdiction of the federal courts to grant relief for an alleged breach of a bargaining representative's duty of fair representation despite the fact that (1) the breach involved might also have been an unfair labor practice,[145] and (2) even though no unfair practice had been involved, the Board could have decertified the representative unless it abandoned its discriminatory representation.[146] It is not easy to see why a partial Board remedy of doubtful effectiveness should be fatal to state power in the *Gonzales* situation when such a remedy does not oust the courts of jurisdiction over discriminatory representation.

Section 14(b) is relevant not only to consummated hiring arrangements which violate state laws operative under that section but also to antecedent pressures directed at securing such arrangements. Where such pressures appear to violate the LMRA as well as state law, the Court, without any explicit consideration of Section 14 (b), has invalidated state injunctive relief.[147] It is true that *Garner* on the surface appears to exclude such state action. But the applicability of *Garner* is questionable because Section 14(b) and its legislative history suggest, as already indicated, that state policy as to union shop-arrangements was to be given paramount effect. Such paramount authority should apply not only to consummated hiring arrangements but also to antecedent pressures directed at achieving them.

Where antecedent pressures violate state law without violating the LMRA, there are even stronger grounds for recognizing state competence to grant injunctive relief. The denial of such competence would result in a self-defeating jurisprudence which commanded an employer not to enter into a union-security agreement while denying him any relief against pressures designed to compel the execution of such an agreement.[148]

It is true that the recognition of state competence would involve the risk of state tribunals restraining activities which might be found to be protected under the national scheme, risks which might be especially acute in states whose enactment of "right-to-work" laws may reflect anti-union attitudes. Restraints on protected activity might occur, for example, where the state tribunal determined, on the basis of conflicting or ambiguous evidence, that union pressure was directed at securing hiring arrangements proscribed by state law, but where the NLRB might reasonably reach a contrary conclusion. Section 14(b) tolerates such risks as to state adjudications concerning the validity of the executed arrangements. If appropriate weight is given to the policy and legislative history of Section 14(b), it is not easy to see why such risks should be fatal where antecedent union pressures are involved.

State Laws of General Application

Some commentators, although urging generally a limited role for state power over labor relations, have also suggested that for preemption purposes a distinction should be drawn between labor regulations, as such, and state regulation of general application. The thrust of this position, which may be illustrated by the views of Professor Cox,[149] appears to

be that the states should be free to enforce general regulations even though such enforcement involves conduct which otherwise is or might plausibly be prohibited or protected under the national scheme. The proposed formula would, of course, avoid the regulatory gaps and the drastic impairment of state power which would result if all state law of general application were foreclosed whenever it impinged on labor-management relations.

The formula involves, however, several difficulties. (1) It rests on a classification scheme which would be extremely difficult to apply to the wide variety of state regulations involved. (2) It appears to dilute the values of uniformity and the avoidance of fine lines of distinction which have been urged in support of comprehensive preemption.[150] These difficulties will be examined and then the predictive value of this formula appraised in the light of the Supreme Court decisions.

The common law of labor relations began as a branch of the law of torts and emerged in the 20th century as a distinct body of regulation.[151] The common law basis for state prohibition of stranger picketing for recognition typically is the general tort doctrine that intentional interferences with advantageous relationships are tortious unless justified and that a union's desire to spread organization is not sufficient justification.[152] It can be urged that such a state regulation is merely a general application of tort law to labor-management relations. But, Professor Cox urges, the application of the tort doctrine involves a social appraisal of the conflicting interests of the union, the employer, and the community in the labor controversy. Since the existence of a labor dispute is central to the social appraisal involved, the application of tort doctrines to make the union's conduct actionable is "labor regulation as such."[153] Presumably, a different social appraisal leading to the legality of stranger picketing would not exclude the same characterization. The critical element in Professor Cox's classification thus appears to be that the liability depends on an appraisal of the distinctive elements of labor management relations in the light of other competing interests or objectives.

In my opinion, the basic difficulty with such a classification scheme arises from the fact that substantially the same social appraisal is involved in any rational legislative or judicial determination that any general regulation should be controlling in the labor-management context. For example, a union which has entered into price fixing agreements with employers or into agreements excluding the purchase of out-of-state goods is indicted under a broad state anti-trust law condemning all arrangements and conspiracies in restraint of trade. The disputed issue is whether the distinctive aspects of the union movement justify a refusal to apply a general standard in the context of labor-management relations. Although the technique for resolving such an issue will depend on whether a statute or a common-law standard is controlling, its resolution will turn on what force should be given to the union's claim that there is a social justification for exempting it from a general standard which on the surface appears to be applicable. It is precisely such a claim which must be adjudicated when a union urges its "right" to engage in stranger picketing or to induce the breach of a contract between an employer and another union. In view of the basic similarity of the social appraisal involved in the anti-trust situation and the prima facie tort situation, the distinction between labor regulation, as such, and regulations of general application appears to be essentially verbal; for whenever the state has concluded that a given rule should control labor relations despite the distinctive elements involved, there is no analytical basis for determining whether the state regulation deals with labor-relations as such or is a rule of general application applied to labor-management relations.

The difficulty of classification is illustrated by Professor Cox's criticism of the decision by the Missouri Supreme Court in the *Weber* case.[154] His criticism rested on the contention that the court, in holding the restraint in question unlawful under the Missouri anti-trust law, relied on the following ground: "[U]nder the terms as above sought to be imposed by the Union, persons employed by or seeking to work for the above construction contractors in moving, erecting or installing machinery in St. Louis area breweries would be compelled to forego representation by their present bargaining agent, the Millwrights' Union . . . and become affiliated with the Machinists' Union in order to retain their employment with such contractors. . . ."[155] Accordingly, Professor Cox concluded that the underlying issue was made to turn "on balancing the interests of employers, employees, and unions in organization or collective bargaining and that, under such circumstances, the states should be no more free to apply anti-trust laws than statutes or court decisions avowedly based upon those considerations."[156]

Under Professor Cox's view, the rhetoric used by the Missouri Supreme Court seems to be the decisive consideration in denying state competence. Plainly, state courts and legislatures, determined to uphold state power, will be able to accommodate their rhetoric to the demands of the situation. Indeed, other passages in the Missouri opinion, not referred to by Professor Cox, if taken at face value, support the conclusion that Missouri was implementing a general

policy against restraint of trade and not "labor regulation as such." Thus the court emphasized throughout that the union was seeking to force the company to become a party to a conspiracy against independent contractors and their Mill-Wright employees,[157] i.e., the union was seeking an agreement which would exclude from the market all contractors not under contract with the union. Such agreements which may be viewed as attempts at permanent exclusion from a market, can plausibly be said to involve the basic evils which anti-trust regulation is designed to suppress. In this connection, it is worth recalling that the basic dispute involved in *Weber* had moved a national administration, not unfriendly to labor, to institute anti-trust proceedings against a union seeking the same kind of exclusive arrangements condemned by Missouri in the *Weber* case.[158]

These considerations underscore the difficulties with the contention that Missouri's regulation should have been invalidated because the Missouri judgment resulted from balancing the interests involved in labor regulation. This contention is no more persuasive than the claim that Missouri attempted to balance the interests involved in the application of general regulations in a specialized context, namely, labor-management disputes. Nor is there anything in the application of Professor Cox's formula to the *Weber* case which affords a useful guide for determining when general regulation, such as anti-trust regulation, will be treated as general regulations for preemption purposes rather than as labor regulation in disguise.

Although, as indicated more fully below, the formula in question may be a useful expedient for avoiding the drastic displacement of a broad range of state regulation, it involves a serious risk of making preemption a game played with labels[159] which naturally do not disclose the determinants of decision. In this connection, it is instructive to compare Professor Cox's treatment of *Weber* with his treatment of a general regulation applied by a state to invalidate the erection of geographical trade barriers by a union through agreements with employers to boycott goods not produced in a given locality. Professor Cox, despite his approval of the foreclosure of state power in *Weber*, recommends the recognition of state competence in the latter situation.[160] It is not easy to see the basis for this difference in result. In both situations the unions are attempting to maximize employment opportunities for their members by excluding specified enterprises from the market.[161] In both situations similar arrangements among employers would appear to violate the state anti-trust law. Accordingly, the ultimate issue faced by state government in each case is whether a union's interest in maximizing employment for its members justifies a relaxation of the general rules against restraint of trade. It is difficult to see anything in the distinction between labor regulation as such and general regulation which warrants different decisions as to state power in these two situations. Nor do the interests emphasized in *Garner*, such as centralized administration of the national act, avoidance of overlap and the like, warrant such disparate results. Thus, if two unions struck for each of these objects there would in each case be similar possibilities of an overlap between state and federal remedies.[162] Consequently, all of the arguments against state power invoked in *Garner* would be equally applicable to both situations.

It is difficult to avoid the conclusion that Professor Cox' formula will spawn a new set of slippery distinctions,[163] thereby frustrating one of the purposes behind his general endorsement of a broad doctrine of federal preemption. Furthermore, that formula also threatens the other values invoked to support such a doctrine, namely, uniformity and preservation of the federally-created balance between labor and management. These consequences of the formula are interesting not only in their own right but also—and more importantly—because the necessity of invoking such a formula to avoid drastic impairment of state power puts into question the basic presupposition behind a broad and abstract rule of federal preemption.

The Court's decisions which bear on the proposed distinction between labor and general regulation, respectively, have not accorded significant weight to the fact that state regulation was of general application. At most, the Court has treated that factor as reenforcing other considerations invoked to sustain state power.[164] As already indicated, that distinction will not serve to explain the Court's disposition of *Weber*.[165] Indeed, in *Gonzales*, the dissenters pointed to broad language in *Weber* which rejected as irrelevant the state's contention that it was applying a rule of general application.[166] Conversely, the fact that Wisconsin in the *Kohler* case predicated its restraint of violence on a labor relations statute did not operate to invalidate state action.[167]

Perhaps the most striking instance of the Court's disregard of the distinction in question and its invalidation of general regulation is its treatment of state cases involving enforcement of so-called hot cargo clauses entered into by common carriers and unions representing their employees. Such clauses frequently give the carrier's employees the right not to cross picket lines and to refuse to handle "hot-cargo," defined to include non-union materials or materials produced by, or consigned to, another employer with whom the contracting union or some other union has a controversy. When such a controversy arises, the

union or the employees may invoke their "rights" under such clauses.

Such clauses appear plainly to be inconsistent with the historic duty of common carriers to serve without discrimination, a duty which arises under state as well as federal transportation law.[168] Interference with that duty by private non-union groups could be remedied by state injunctions. Where, however, such injunctions or similar relief has been directed at unions or employers who are parties to hot cargo clauses, the Court has reversed, *per curiam*.[169] Furthermore, the Court has chosen not to notice that such cases involve three separable, if related, issues. The first relates to the propriety of a union's enlisting the help of the employees of employer B, the common carrier, in order to secure the union's demand against employer A, the primary employer. This issue involves the scope of the secondary boycott provisions [Section 8(b)(4)(A)] of the LMRA. The second issue goes to the validity of a hot cargo clause under the general transportation law of the state—an issue which has been pinpointed in the state litigation by requests for a declaration of the invalidity of such clauses.[170] The third issue relates to the propriety of an injunction which requires not only the carriers but also their employees not to interfere with the rendition of equal services to the primary employer. A persuasive argument could be made that state determination of the second issue involves the effect of a transportation regulation of general application and not labor regulation as such. A similar argument could be made as to an injunction running against the carriers' employees and prohibiting interference with the carriers' discharge of its obligations, although the argument in this context involves greater difficulties.[171] Indeed, the Court in dealing with the significance of a hot cargo clause as a defense to charge of violation of the LMRA's ban against secondary boycotts explicitly recognized that the validity of a hot cargo clause and its impact on the carrier's obligation to serve was a matter of transportation, rather than labor policy.[172] But in dealing with state power over hot cargo clauses, the Court did not consider the separation of the transportation issue from the related issues but, by cryptic *per curiam* decisions, nullified the state action *in toto*.[173]

If, as the foregoing discussion suggests, the label or the generality of state regulation is not a passport to validity, either all general regulation impinging on labor management relations will be invalidated unless the challenged regulation falls within established exceptions to the general rule of preemption or supplementary criteria will have to be developed. Total invalidity would, as indicated above, involve so drastic an attrition of state power and would leave such regulatory gaps as to be almost unthinkable. It would, for example, be bizarre indeed to strike down FEPC regulation, anti-trust regulation, transportation regulation, various forms of safety regulation, merely because such regulation limited the objectives sought in collective bargaining. On the other hand, the development of supplementary criteria which will give meaningful guidance to the interests affected and to state tribunals will be no easy task. Perhaps, all that can be said is that the decisive factor will be a judgment as to the impact of the state regulation on the central purposes of the national act. For example, FEPC regulation, barring the use of either collective bargaining or employer-determined hiring practices as an instrument of racial discrimination might well be treated differently from state imposed wage-ceilings or from general licensing requirements applicable to all agents of out-of-state organizations who solicit dues or the power to represent persons in their economic relations.[174] Different treatment of those situations would appear to be justified because FEPC legislation seems to be more remote from the central objectives of the union movement and seems to involve less of threat to collective bargaining and employee freedom to choose their representatives than do the other forms of state regulation referred to above. It is plain, however, that difficult issues of degree are involved and that there is a genuine danger that the resolution of these issues will involve the Court in the slippery game of passing on the wisdom of the state action or the propriety or conventionality of the union objectives. But similar risks are a familiar and a possibly inescapable aspect of federalist accommodation.

In this process of accommodation, the fact that the state regulation applies generally to the non-unionized as well as the unionized sector, although not decisive, is not wholly irrelevant. The generality of the regulation may, together with other considerations, reflect the importance which a state attaches to the values involved. The requirement of generality may, moreover, curb regulations devised for the sole purpose of creating roadblocks to effective union organization or collective bargaining. But the reality of such a curb would, of course, depend on whether drafting skills or selective enforcement policies could be exploited to dress up anti-union legislation as general regulation. These considerations, which suggest that in some situations weight may be attached to the fact that regulation is of general application, are not offered as neat logical solutions for difficult questions of degree. They are essentially pragmatic limitations on both the range of state power which will be validated and on the otherwise broad sweep of current preemption doctrines.

NLRB Self-Limitation and State Competence

Guss v. Utah Labor Board[175] involved the most dramatic attrition of state power in the area of labor relations. In *Guss,* the Court (with Mr. Justice Burton and Clark, dissenting) ruled that the NLRB's *ad hoc* decision not to handle a specific case or its published jurisdictional standards limiting its statutory power did not result in state authority to handle matters excluded from the Board's effective jurisdiction. The proviso added to Section 10(a) of the Wagner Act by Taft-Hartley provided, the Court concluded, the only method by which the states could be authorized to handle matters within the Board's statutory jurisdiction. That proviso empowered the Board to cede jurisdiction over certain cases to a state agency provided that there was conformity between the state regulation and the national statute. The Court read the proviso as excluding state action in cases where the Board, instead of ceding its jurisdiction, declined to exercise it.[176]

No state has been able to meet the requirements of the proviso, as interpreted by the NLRB. Accordingly, the result of *Guss* and the Board's policy of selective jurisdiction is, of course, a no-man's land in which conduct unlawful under both federal and state law is not restrained by the Board and cannot constitutionally be dealt with by the states. This result, which under any circumstances would be indefensible as a matter of policy, is a grotesque paradox in the context of the LMRA. That statute in general expanded regulation of labor relations. It reflected, moreover, both in its provisions[177] and its legislative history[178] a special concern for the labor relations of smaller enterprises. And yet all regulation of the labor relations of such enterprises is suspended unless they fall within the ill-defined and shrinking category of businesses which do not "affect commerce" or unless exceptions to preemption, e.g., cases involving violence, are applicable. This result is an eloquent reminder of the difficulties produced by the failure of Congress to bring responsible craftsmanship to bear on the problems of federalism implicit in the LMRA.[179]

Guss has sharpened for both the national government and state tribunals a set of problems whose solution will determine the effectiveness of labor regulation in the no-man's land and the scope of state authority over "small business." The essentially national problems include:

> (1) The validity of the Board's jurisdictional standards, which have for some time been challenged as beyond the Board's statutory authority[180] and which, after *Guss,* have been challenged as a violation of the fifth amendment.[181]
>
> (2) Revision by the Board of its jurisdictional standards, with a view to reducing or eliminating the no-man's land.[182]
>
> (3) The content of remedial legislation in the area "affecting commerce": (a) Should Congress require the Board to exercise jurisdiction over every enterprise subject, as a matter of constitutional law, to the commerce power? (b) Should the Board be authorized to limit its own jurisdiction either by general standards announced in advance or by *ad hoc* determinations? (c) Should Congress determine the limits of the Board's jurisdiction regardless of how those limits are defined? (d) Should the states be able to act independently of the national policy in the area of declined jurisdiction? (e) Should state action be subjected to the national policy through review by the NLRB or by the federal courts, with frivolous review deterred by the assessment of counsel fees against the culpable party?

An extensive discussion of these problems is beyond the scope of this paper.[183] But a few general comments may be in order. First, it is plain that the Court cannot alone work out viable solutions. The Court can command the Board to occupy the no-man's land but only Congress can supply the necessary funds. Although Congress has recently increased appropriations for the Board,[184] Congress, faced with a growing deficit and international tensions, is an unpredictable provider. The net result of judicial invalidation of the Board's current policies may mean theoretical relief for employees and employers involved in small enterprises which "affect commerce" but a denial of effective relief to all employees and employers because of increased delays in an area where a meaningful remedy must be a prompt one. This result plainly leaves much to be desired although it is appealing because it affords a remedy to the groups which need it most and "equal" in the sense that it may equalize chaos.

The problems which would be raised by requiring the Board to exercise jurisdiction over all of the enterprises affecting commerce obviously cannot be solved solely by larger appropriations. More money and more staff will not eliminate, and may indeed accentuate, the difficulties and delays inherent in an effort by a five man board in Washington to regulate up to the periphery of the national competence.[185] Legislative changes in the Board's administrative structure,[186] coupled with a legislative review and revision of rigid, time-consuming, and unproductive statutory requirements[187] may perhaps make it possible for the Board to deal with a substantially increased load without multiplying current delays.

Pending such action, *Guss* will naturally complicate jurisdictional determinations by state agencies.

State power theoretically extends only to an ill-defined category of enterprises which do not "affect commerce." The Court has indicated that contacts with interstate commerce which are more substantial than "de minimis" are a sufficient predicate for the exercise of the national power.[188] The Court has, moreover, made it clear that the existence of national power is not to be determined solely by the quantitative effect of the activities under litigation. "Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce."[189] But there are practical limits to the all-encompassing national power implicit in this approach. "Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity."[190] Precisely where scholastic reasoning ends and a functional approach begins has necessarily been left open. More concretely, the labor cases in which the Court has delineated the broad reach of the commerce power have not involved "small" retailers[191] and service establishments which are loosely considered to be "local." Whether the Court will now validate state regulation of such enterprises is wholly conjectural. But so long as the no-man's land exists, it will invite a vigorous and perhaps, in constitutional terms, an over-vigorous exercise of state power as the only method of shrinking the regulatory vacuum. It may also invite the Court by denial of certiorari to disregard state encroachments on the commerce area.

Beyond these questions of efficiency, there are naturally touchy and imponderable questions of faith suggested by slogans such as "states rights" and "uniformity in a national economy." In this connection it is again useful to keep in mind the difference between the exercise of federal power to enforce minimal standards throughout the sphere of national competence and the exercise of that power to exclude all state regulation. If the federal power is to be exclusive in the area of its application, the vitality of the federalist ideal and practical pressures may be strong enough to exclude federal power entirely from smaller business, thereby jeopardizing minimal federal objectives in that area. Thus, the accommodation in the no-man's land may well depend on the distribution of federal and state power throughout the whole area of labor relations.

The problem of federal-state accommodation in the no-man's land and elsewhere plainly call for Congressional solution. They involve clashes in basic outlooks and values whose resolution generates enormous strains on the Court—strains on its internal unity and on public acceptance of the finality and authority of its judgments. The tensions resulting from the lawless opposition to integration in education underscore the need for Congress to reduce the number of sensitive political judgments which the Court must make concerning matters which are not controlled by the Constitution. Perhaps these considerations, together with the anomaly of the no-man's land, will move Congress to face the intellectual, political, and practical difficulties raised by legislation which would occupy the no-man's land and which would also lay down clearer guides for an adjustment of federal and state power in the entire area of labor relations.

Section 301 and the Enforcement of Collective Bargaining Agreements

The dominant Congressional objective behind the enactment of Section 301 of the LMRA was a relatively simple one, namely, to eliminate certain technical obstacles to suits for breach of collective bargaining agreements.[192] Such obstacles had been particularly formidable in actions at law because of the common law requirement that all members of a union be joined as party defendants or party plaintiffs[193] and because of the failure in actions at law to shape the class suit into a device for satisfying or avoiding the requirements of common law doctrines. Congress, in its effort to overcome those difficulties, gave inadequate attention to federal-state relationships and to the relationship between judicial and administrative competence. As a result the Congressional effort to simplify the enforcement of rights under a collective bargaining agreement has paradoxically surrounded such enforcement with perplexing complexities.

Section 301 (a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Although the quoted provisions appear to be only a grant of jurisdiction, it should be noted that the standards for vicarious responsibility embodied in Section 301 (b)[194] constituted substantive regulation; this provision was the only unequivocally substantive regulation in the section.

Section 301 has raised seven major problems:

(1) Did it confer only jurisdiction on the federal courts, which (respondeat superior problems aside) were to apply state law in determining liability in

actions for breach of collective bargaining agreements? If so, was the section invalid as beyond the judicial power granted by Article III of the federal Constitution?[195]

(2) Did Section 301 provide for the development by federal courts of a new federal law of collective bargaining agreements, thereby avoiding any constitutional problem under Article III?

(3) If so, was state law displaced in state as well as in federal courts?

(4) Insofar as state law was displaced, what was to be the source of the new federal substantive law?

(5) Was state jurisdiction also preempted?

(6) If state law was displaced but state jurisdiction survived, a set of problems, which may be conveniently described as the converse of the problems raised by *Erie R. R.* v. *Thompkins*[196] would result. Three considerations promised to make such problems especially troublesome in this context (a) The injunction is of great importance as a weapon and as a symbol in labor disputes. (b) Some states lacked restrictions on state injunctive procedures comparable to those imposed by the Norris-LaGuardia Act[197] on the federal courts. (c) The legislative history of Section 301 implied that state remedies, including, apparently, injunctive relief, were to be supplemented rather than superseded.[198].

(7) Suits for breach of contract would sometimes involve conduct which could plausibly be claimed to be prohibited or protected under the LMRA and would also involve questions concerning the rights of unions to represent particular employees. Since such questions are for some purposes within the Board's exclusive jurisdiction, suits under Section 301 would require an accommodation between judicial power and that of the NLRB.[199]

In *Association of Westinghouse Salaried Employees* v. *Westinghouse Corporation*,[200] the first case requiring the Court to determine the reach of Section 301, the question raised by Article III was deferred by a remarkable exercise in "statutory construction" and by a 3-3-2 division within the Court. *Westinghouse* involved a suit by a union for wages allegedly due to about 4,000 employees under the provisions of a collective bargaining agreement. There were four separate opinions, none of which secured a majority. Mr. Justice Frankfurter announced the Court's judgment that Section 301 did not authorize suits by unions to enforce employees' "personal" claims for wages. His opinion, concurred in by Mr. Justice Burton and Minton, emphasized that Section 301 was designed only to supply a federal forum for the enforcement of state law. To avoid the grave constitutional question posed by such an interpretation, the section was given a narrow construction, viz., that it did not extend to the *Westinghouse* case.

The Chief Justice, Mr. Justice Clark and Mr. Justice Reed concurred in the holding, but their opinions rejected the suggestion of a constitutional infirmity in Section 301.[201] Mr. Justice Douglas, in a dissenting opinion concurred in by Mr. Justice Black, urged that the union had standing to sue and summarily disposed of the Article III question by asserting that Congress had authorized the federal courts to develop federal rules for the interpretation of collective bargaining agreements.

The process by which Mr. Justice Frankfurter avoided the constitutional issue seemed to involve a striking disregard of the language of Section 301 (b). That subsection provided explicity that a labor organization, where commerce was affected, "*may sue or be sued as an entity and in behalf of the employees whom it represents* in the courts of the United States." (emphasis added.) This language, which surprisingly was not invoked by the dissenters, had separate significance only if it authorized unions to enforce rights which in one sense were "personal," to individual employees.[202] Furthermore, a literal construction of the quoted language was supported by several practical considerations: First, there is a close relationship between the union's enforcement of so-called personal rights by the grievance–arbitration procedure and by court action, where necessary. Secondly, there were substantial difficulties involved in separating "individual" and collective interests.[203] Thus some familiar contract clauses, e.g., a provision that employees be paid for time spent on union activity or a provision against discrimination for union activities, plainly involve a coalescence of individual and collective interests. Furthermore, the union, as the individual's representative for the negotiation and administration of the agreement, has an interest in the proper application of every contract clause. This interest was recognized in other provisions of the statute even though they were primarily directed at protecting the interests of the individual employee.[204] Finally, although court action by individual employees where permitted by the collective agreement[205] had not, as Mr. Justice Frankfurter noted, been blocked by the procedural obstructions to actions involving unions, there were other practical obstacles to such suits. Thus where restrictive doctrine precluded the use of the class suit as a device for enforcing small claims, the small stake of each potential plaintiff involved excessive litigation expenses, which might result in the abandonment of the claim. In view of the foregoing considerations, the line drawn by a majority of the Court seemed a dubious one whether tested by the language of the statute or by the functional problems involved.

That line, moreover, in no way changed the character of the constitutional issue which ultimately would be raised by a case involving a union's "collective interests." If in such a case the constitutionality of Section 301 were sustained, doubt as to the continued vitality of the *Westinghouse* decision would necessarily result.[206] *Westinghouse*, insofar as it was based on constitutional considerations, was thus a delaying action. Since it involved distinctions dubious in the light of functional considerations and the possibility of early obsolescence, it was doubtful that the delaying game was worth the candle.

In *Textile Workers Union* v. *Lincoln Mills*,[207] the Court disposed of the constitutional problem tabled in *Westinghouse*. Its reasoning provoked thoughtful complaints that it had not candidly faced the difficulties involved, had dealt cavalierly with evidence of legislative purpose, and had substituted dogmatic assertion for reasoned discussion.[208].

Lincoln Mills, and its two companion cases,[209] each involved a controversy about the amount of money due to individual employees under a collective bargaining agreement providing for arbitration as the terminal step for settling specified disputes. In each case the employer, after processing a dispute through the pre-arbitration steps, declined to submit it to arbitration. The unions in each case thereupon brought an action in a federal district court for specific performance of the agreement to arbitrate. They invoked Section 301(a) of the LMRA as the source of federal jurisdiction and relied on that section and the United States Arbitration Act[210] as a source of equity jurisdiction.

The Court's opinion was announced by Mr. Justice Douglas, who spoke for a majority of five. It held that Section 301 requires federal courts to give specific enforcement to agreements to arbitrate grievance disputes. It relied largely on the legislative history of Section 301. This history, although characterized by the Court as "cloudy and confusing,"[211] was read as reflecting a federal policy of promoting the inclusion of no-strike clauses in collective bargaining agreements and providing for the enforceability of such clauses. Arbitration agreements, the Court urged, are the *quid-pro-quo* for no-strike clauses.[212] Accordingly, Section 301 was not merely jurisdictional. "It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way."[213] This policy required specific enforcement of arbitration clauses.

The Court, having asserted earlier in the opinion that Section 301 is a mandate to the federal courts to fashion a body of law for the enforcement of collective bargaining agreements,[214] turned to this question again but merely reiterated its assertion. It thus surmounted any constitutional obstacle under Article III by making it clear that litigation under Section 301 would present "a federal question." This phase of its opinion, in striking contrast to the first phase, contained no references to legislative history; its earlier references did not bear on this basic problem.

The Court's conclusion that Section 301 itself must be read as providing for specific enforcement of arbitration clause made it unnecessary to deal with problems raised by the United States Arbitration Act, which was not mentioned.[215]

The Court did, however, consider the broad restrictions on the jurisdiction of federal courts embodied in the Norris-La Guardia Act. Although conceding that a literal reading of that Act barred specific enforcement of arbitration clauses,[216] the Court found it inapplicable because such enforcement was not "part and parcel of the abuses against which the Act was aimed."[217] It found further justification for its position in Section 8 of Norris LaGuardia, which endorses the settlement of disputes by arbitration by denying injunctive relief to any person who has not made "every reasonable effort" to settle a labor dispute by arbitration, among other means.[218] Accordingly, the Court concluded, there was "no justification in policy for restricting Section 301 to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act."[219]

Mr. Justice Burton, joined by Mr. Justice Harlan, concurred separately. They found federal power to fashion an "appropriate remedy," i.e., specific performance, in Section 301 itself, in inherent equitable powers, "nurtured by a Congressional policy to encourage and enforce labor arbitration in industries affecting commerce."[220] Their crucial difference with the majority lay in their conclusion that the federal courts should apply state substantive law and should look to federal law only in connection with remedial questions. They surmounted Article III problems by approving a concept of "protective jurisdiction."[221]

Mr. Justice Frankfurter wrote a 24 page dissent supplemented by an 85 page appendix, embodying extracts from the legislative history. He urged that the Court's transformation of a plainly procedural or jurisdictional section into a mandate for the invention of a body of substantive federal law had ignored both the language of Section 301 and its legislative history. He urged also that even if such a mandate were inferred, the relevant federal law, the United States Arbitration Act, excluded specific enforcement of arbitration clauses in collective bargaining agreements. Finally, he rejected the applicability of the

protective-jurisdiction concept to this case. He concluded that Section 301, as an exclusively jurisdictional provision which was to operate in the absence of diversity of citizenship or a federal question, was beyond the federal judicial power conferred by Article III of the Constitution.

A comprehensive analysis of the rival positions advanced in Lincoln Mills would be a tempting exercise. But such an analysis, which has already been ably done,[222] would take us too far afield from our main concern, which is the unresolved problems regarding the role of state law and state jurisdiction in the enforcement of collective bargaining agreements.

The Court in *Lincoln Mills* declared:

> " . . . the substantive law to be applied in suits under § 301 (a)[223] is federal law, which the Courts must fashion from the policy of our national labor laws. . . . The range of judicial inventiveness will be determined by the nature of the problem. . . . Federal interpretation of federal law will govern, not state law. . . . But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights."[224]

The Court spoke in the context of an action filed in a federal court pursuant to Section 301(a). Nevertheless, its language suggests that federal law will also control actions which could have been filed in a federal court, but were filed in a state forum.[225] The federal law governing collective bargaining agreements plainly appear to constitute "laws of the United States" binding on state courts by virtue of the supremacy clause of the Constitution.[226] Furthermore, given the Court's general emphasis on the desirability of uniform handling of problems of labor relations and its particular emphasis in *Lincoln Mills* on the federal interest in the integrity of collective bargaining agreements, it is highly unlikely that the Court would sanction the development of two competing systems of substantive regulation applicable to actions on collective bargaining agreements.

The Court's opinion does not make clear whether state jurisdiction over Section 301 actions, as well as state substantive law, is foreclosed. Such jurisdictional preemption has been urged by commentators.[227] But whatever the merits of such a result as a matter of policy,[228] Section 301 does not provide that federal jurisdiction should be exclusive, and its legislative history suggests that state jurisdiction was to be supplemented rather than superseded. Thus unless the Court is prepared to sanction a free-wheeling inroad on traditional state jurisdiction, it will recognize parallel state jurisdiction over Section 301 actions.[229]

The recognition of such jurisdiction, coupled with the controlling effect of a federal "substantive law," will involve complex adjustments between the state and federal system. The converse of the difficulties which have surrounded the *Erie* doctrine in the federal courts will as already indicated, be transplanted into the state system. What is the line between "substantive" and "procedural" law for this purpose? May states use the machinery prescribed by their arbitration acts to enforce an agreement to arbitrate or an arbitration award?[229] May state courts deny remedies, such as specific enforcement of arbitration clauses, granted by the federal courts. May the state courts grant remedies, such as the specific enforcement of no-strike clauses, which may be denied in the federal system. Such problems, which will be discussed below, will be puzzling even after content has been given to the federal law, which, in Mr. Justice Frankfurter's phrase, is still largely "in the bosom of the judiciary."[231] But during the period of uncertainty, which promises to be long, state courts will be bedeviled by questions concerning both the content and the authoritative sources of federal law. How, for example, does a decision by a federal district court sitting within or outside of a given state rank with a decision of the highest state court?[232]

The state courts will, in addition to these special problems, have problems in common with the federal courts while the federal law is being developed. Under *Lincoln Mills*, federal law governing collective bargaining agreements is to be derived from the policy of our national labor laws. Federal labor laws and other federal laws, such as antitrust regulation, which impinge on labor relations, are complex and often reflect policies not easy to accommodate.[233] Furthermore, except for a narrow range of issues,[234] it is difficult to secure from the LMRA or other national labor laws significant guidance for the development of a new body of jurisprudence to govern the enforcement of collective agreements. It thus seems likely that the new federal law will be distilled largely from state court doctrines, which in turn were derived largely from commercial law analogies reshaped to some extent to reflect the distinctive elements of the collective bargaining relationship. The large and growing body of published arbitration awards will presumably be another source of guidance. Whatever the ultimate content of the federal law, it seems likely that state courts will during its developmental stage identify their own precedents as "federal law" unless the precedents appear to be unsound or incompatible with purposes implied by the LMRA or other federal statutes.

Soon after the decision in *Lincoln Mills,* several of the major problems flowing from the Court's approach were presented to the California Supreme Court in *McCarroll v. Los Angeles County District Council of Carpenters.*[235] In *McCarroll,* a labor union had entered into a collective bargaining agreement containing a no-strike clause and a conventional grievance and arbitration clause. The union, claiming that the employer had engaged in allegedly illegal labor contracting and had not conformed to safety standards, called a strike. The Supreme Court of California, with one judge dissenting, affirmed the grant of a preliminary injunction against the union's violation of its no-strike pledge. The court in an opinion by Justice Traynor concluded that the Norris LaGuardia Act would have precluded injunctive relief by a federal court[236]—a conclusion which is, however, open to question under the rationale of *Lincoln Mills.*[237] Although recognizing the controlling effect of federal substantive law, the court concluded that a state was free to grant a remedy unavailable in a federal forum.

The problem of disparate state and federal equitable remedies for contract violation involves a dilemma which cannot be resolved in a manner which is compatible with both the implications of *Lincoln Mills* and the legislative history of Section 301—a dilemma which annotates Mr. Justice Frankfurter's warning in his *Lincoln Mills* dissent[238] that the Court's approach "is more likely to discombobulate then to compose." Although the Court in *Lincoln Mills* unfortunately did not set forth the policy considerations supporting the supersession of state substantive law, presumably it deemed the uniformity which might ultimately be achieved as justifying the labor pains which would surround the birth of a federal substantive law.

The importance which the Court apparently attached to uniformity is a basis for a strong argument that the Norris La-Guardia Act, although literally applicable only to federal courts, should also control state enforcement of collective bargaining agreements. The availability of a labor injunction has a crucial impact on the balance of power between the contending forces. Furthermore, the Supreme Court in the much debated *Hutcheson* case[239] gave far-reaching substantive effect to the Norris La-Guardia Act in the federal system. Presumably, the uniformity which the Court seeks is not a wooden uniformity of "substantive" rather than "remedial" law, but a uniformity which is meaningful in the light of the interests at stake. Such meaningful uniformity would be frustrated by a doctrine permitting either forum-shopping for the purpose of securing an injunction in labor disputes[240] or disparate results in the federal and state courts.

In this connection, the Supreme Court's recent decision in *Bernhardt v. Polygraphic Co. of America,*[241] is significant. In *Bernhardt,* the Court held that a federal court, required by *Erie R.R. v. Thompkins,*[242] *to* follow state "substantive" law in a diversity action, was barred from specifically enforcing an agreement to arbitrate where that remedy was not available under the applicable state law. It found the remedy "outcome-determinative" within the meaning of *Guaranty Trust Company v. York.*[243] In the converse situation presented under Section 301, the desire for uniformity which apparently moved the Court to fashion a controlling federal law, would appear to require the states to deny injunctive relief if it is not available under federal law.[244]

Although the Supreme Court of California in *McCarroll*[245] expressed doubts as to the authority of Congress to require state courts to withhold state remedies in Section 301 litigation, such doubts seem unwarranted. Congress may lack authority to impose general regulations on state procedure, but the supremacy clause and the commerce clause, which would support the complete ouster of state jurisdiction, would also appear to support a Congressional mandate that strikes in the area of commerce, although giving rise to damages, should be free from state, as well as federal, injunctive relief.

If, however, the implications of the policy of uniformity were followed, a paradoxical frustration of the purpose behind Section 301 would be involved. The pertinent legislative history suggests that the primary objective of Congress was to secure increased union compliance with no-strike clauses by facilitating the recovery of damages for the breach of such clauses.[246] Although Congress deliberately declined to lift the restrictions of the Norris La-Guardia Act from federal courts, neither section 301 nor its legislative history discloses a purpose to interfere with state procedures or state remedies. On the contrary, the legislative history suggests that reliance was to be placed on the normal processes of the courts,[247] which included injunctive relief in those states which lacked baby Norris La-Guardia Acts or which had construed them as inapplicable to contract disputes.[248] Furthermore, a damage suit is often a much less effective stimulus to union responsibility than injunctive relief. It would, as Justice Traynor suggested in *McCarroll,*[249] be an ironic twist to read Section 301 as excluding state injunctions against breach of a no-strike clause.

The Supreme Court may escape from the dilemma illustrated by *McCarroll* and from all of the converse-of-*Erie* problems by holding, contrary to *McCarroll,* that state jurisdiction over Section 301 actions, as well as state law, is preempted. Complete federal preemption would be a logical sequel to *Lincoln Mills* and an escape from some of the problems it has spawned.

But, as indicated above, it would, in the absence of new legislation, appear to involve an impairment of state power unwarranted by either the language or the history of Section 301.

If state competence survives, state as well as federal courts will be faced with a series of subtle and complex problems when contract actions raise issues which for some purposes are within the jurisdiction of the NLRB. Such issues may, for example, arise from contentions that the alleged contractual violations were or might be deemed to be conduct prohibited by the LMRA or (2) that the alleged violations were justified by the plaintiff's antecedent unfair labor practices and were consequently protected by the federal statute or (3) that the validity of the underlying contract or of the particular contractual provision in question, or that the right to maintain a contract action, depends on statutory or administrative criteria which peculiarly involve the Board's expertise and which should therefore be applied by the Board rather than by the courts. Such issues will call upon the state courts, and the lower federal courts, initially, and the Supreme Court, ultimately, to make adjustments between two putatively competent jurisdictions, that of the courts over contract actions and that of the Board over unfair labor practices, representation matters, and protected activities.

In this connection, it is useful to refer generally to the respective responsibilities of the NLRB, the courts, and arbitrators for issues involving an alleged breach of a collective bargaining agreement. The interpretation and administration of collective bargaining agreements is the responsibility of the courts and of arbitrators and not of the Board. The Board, although not the proctor of the bargain, is the proctor of the bargaining process; in policing that process and in enforcing the duty to bargain, the Board will sometimes be faced with issues as to the scope of the bargain. Thus Section 8 of the LMRA provides that the duty to bargain is violated by the use of economic power to secure the modification of an existing contract provision during the term of the contract. Similarly, the Board has held that a unilateral repudiation of the existing terms of an agreement, or an employer's unilateral change in wage rates or other conditions of employment, constitutes a violation of the duty to bargain.[250] Charges of violations of the duty to bargain thus sometimes require the Board to determine the scope of any explicit or implied agreement sanctioning or excluding unilateral action.[251] But such determinations are primarily a function of the Boards concern with the integrity of the bargaining process and not of any jurisdiction over breaches of the agreement as such.

The LMRA in general commits to the courts the responsibility for remedying breach of collective bargaining agreements. But in practice the issues of contract administration raised by claims of breach are for the most part resolved by recourse to arbitration rather than the courts.[252] Congress was familiar with, and endorsed,[253] the use of the arbitration mechanism —an endorsement which was generously implemented by the Court in *Lincoln Mills*.[254]

The respective functions of the Board, the courts, and arbitrators, suggest strongly that an overlap, actual of potential, between statutory and contractual prohibitions should not in general curtail the jurisdiction of the courts directly to remedy alleged breaches of substantive contractual provisions or to compel recourse to the contractually prescribed arbitration procedures for the disposition of the issues involved. The Supreme Court has not yet ruled on these questions; the opinions of other courts are obscure[255] and conflicting[256] and the commentators are also divided.[257] Accordingly, it may be useful to consider two specific instances of overlap which have proved troublesome: (1) actions to remedy an alleged violation of a no-strike pledge when the strike may be an unfair labor practice;[258] (2) actions to compel specific performance of an agreement to arbitrate or the observance of an arbitration award, when the underlying conduct which is within the putative competence of the arbitrator may be an unfair labor practice.[259]

A strike (or a lockout) designed to change the provisions of a collective bargaining agreement during its term is generally a violation of both the federal statute and of a typical no-strike clause. Under the LMRA both the courts and the Board are putatively competent with respect to the underlying conduct. But the perspective of the Board, on the one hand, and the courts and arbitrators on the other, differ. The courts are concerned with the compatibility of the conduct with the standards embodied in the bargain; the Board with the compatibility of the conduct with the statutory standards regulating the bargaining process. Since the Courts and the Board have different standards and are reaching for different, if related, objectives, the fact that their respective jurisdictions may overlap in a given situation does not appear to warrant a destruction of either type of jurisdiction. Accordingly, such overlap alone would not appear to justify a limitation on the general legislative purpose—to entrust contract actions to the courts or, where the parties prefer, to arbitration.

The contrary approach would not only risk frustration of that legislative purpose but would also give rise to important and unnecessary practical disadvantages. It would complicate judicial enforcement by requiring the courts to test their jurisdiction against a complex body of NLRB precedents which are not

directly relevant to issues of contract administration. It would deprive litigants of a complete, and often more expeditious, judicial remedy because of the possible existence of an administrative remedy which might, however, not be forthcoming. The possible existence of two remedies thus might in practice paradoxically result in the denial of any remedy.[260] Such denial would, of course, always result in cases falling within the no-man's land.

Garner[261] has been invoked[262] to support ouster of judicial competence over contract remedies involving overlap with the statutory remidies. But the applicability of *Garner* in this context is extremely questionable. *Garner* did not involve the enforcement of obligations voluntarily assumed by the parties but the enforcement of obligations imposed by the coercive power of the state.[263] The failure of the LMRA to deal expressly with the exercise of such coercive power contrasts sharply with its explicit sanction of judicial competence over contract actions—a competence which the statute does not purport to qualify in situations involving overlapping remedies. Furthermore, where a defendant challenges the jurisdiction of a court over contract actions on the ground of possible overlap, judicial action, even if it reaches conduct prohibited by the statute, will involve only a different method of vindicating the national policy. And if the defendant's conduct is not prohibited by the statute, there is no room for the approach suggested by *Garner*, under which activity not prohibited by the federal act is to be free from supplementary governmental prohibitions. Section 301 means that supplementary prohibitions imposed by collective bargaining agreements are in general to be judicially enforced even though they may curtail activities which, in the absence of contractual restrictions, would be protected by the statute. In view of the essential differences between the problems involved in *Garner* and those raised by the exercise of the power conferred by Section 301, overlap between contractual and statutory prohibitions does not appear to warrant curtailment of judicial power to enforce collective bargaining agreements.

This conclusion is reenforced by the decisions of the Court in other contexts. Thus the Court has held that judicial enforcement of Section 303 of the LMRA is competely independent of Board enforcement of the parallel provisions of Section 8 (b) (4).[264] Section 303 imposes liability in damages for violations of the complex provisions of Section 8 (b) (4), which, as to permanent preventive relief, are within the Board's exclusive jurisdiction. The case for independent judicial competence as to contract enforcement under Section 301 is considerably stronger in view of the fact that the statute generally entrusts such questions to the courts rather than to Board.

The overtones of *Gonzales* point in the same direction. It will be recalled that the Court there emphasized that the crux of the action was contractual and that remedies for breach of contract should not be displaced merely because of a possibility of overlap with a Board proceeding.[265] Although the "contract" involved in *Gonzales* was not covered by Section 301, that fact does not weaken the implications of that case for the problems of overlapping jurisdiction in the context of Section 301. The dominating consideration both as to Section 301 agreements and the "contract" embodied in union constitutions is that both types of agreements were to be enforced by the courts. If overlap does not oust the courts as to the membership contract, it should have no greater effect as to collective bargaining agreements. Indeed, in view of the plain and explicit mandate of Section 301, it is arguable that greater protection to judicial competence over Section 301 actions would be appropriate.

All of the considerations which support judicial competence directly to enforce the substantive provisions of a contract despite their possible overlap with the LMRA apply where the aid of a court is invoked to support the arbitration process in an action to compel observance of either an agreement to arbitrate or an arbitration award. There are, moreover, additional reasons for sanctioning judicial competence to support the arbitration process under such circumstances. The widespread use of the arbitration mechanism as "an instrument of self-government" is persuasive evidence of its utility. Arbitration has, moreover, been endorsed not only by the LMRA but also by the Board. Thus the Board, which has been extremely jealous of its jurisdiction in non-contractual matters, has not sought to displace arbitral jurisdiction in cases of overlap. On the contrary, it has relinquished its own jurisdiction in deference to arbitration—a self-denial which is striking in view of the provisions of Section 10 (a) of the LMRA. Although the Board's decisions involve uncertainties, they indicate generally that even though alleged contractual violations are or may be statutory violations, arbitral procedures prescribed by the contract should be exhausted before there is recourse to the Board's machinery.[266] And where an arbitrator has adjudicated an issue within the Board's statutory jurisdiction, the Board will in general stay its hand except where its intervention is necessary to remedy procedural unfairness in the arbitration process or to reverse a result repugnant to statutory policies.[267] The Board has thus recognized that the national policy entrusts the responsibility for securing performance of contractual obligations to other tribunals. It has, moreover, recognized the special values attached to the arbitration process. And the Board's approach represents an ap-

propriate adjustment between those values and the desirability of protecting the basic standards embodied in the national scheme. It gives the mechanism of self-adjustment full scope and yet permits correction of procedural abuse or departures from the federal standards by the exercise of the Board's paramount power. Similar considerations justify the preservation of judicial competence to aid the arbitration process despite the fact that the underlying conduct to be adjudicated may involve statutory as well as contractual prohibitions.

It may be urged, however, that the values of arbitration depend essentially on the parties' willingness to use it after a particular controversy has arisen. Thoughtful students have expressed concern that judicial intervention in cases which involve a breakdown of arbitral procedures threatens the values of arbitration as a self-operating instrument of self-government.[268] It is not necessary here to explore the merits of that position or to elaborate the interesting contrast between it and the long search for obligatory jurisdiction and the rule of law in the international sphere. It is sufficient to note that *Lincoln Mills* has declared that the national policy favors the use of judicial power to compel the parties to use arbitral machinery prescribed by the contract.

The exclusion of judicial competence because of overlap would not only undercut that policy but might also result in an artificial fragmentation of the arbitrator's jurisdiction and the intrusion of unnecessary technicalities in grievance adjustment. A concrete situation will illustrate these difficulties. A typical contractual provision, prohibiting employer discrimination against employees on account of their union activities, duplicates the prohibition of Section 8 (a) (3) of the LMRA. Findings of fact which established or negated the violation of the contract provisions would, if accepted, presuppose the same result under the statute. But a collective bargaining agreement would typically contain another provision protecting employees against discharge without "just cause." The Board does not, however, police discharges not based on "just cause" unless they are connected with employee participation in or abstention from union (or related) activities.

Under the contract described above, if an employee's discharge were questioned, the issues before the arbitrator would not be the same as those before the Board in an unfair labor practice proceeding. Both the Board and the arbitrator would be faced with the issue as to whether discrimination had entered into the discharge. But for the Board, unlike the arbitrator, that would be the only issue in the case. Once the Board rejected the charge of discrimination, it would have no jurisdiction over the issue of employee misconduct and the appropriateness of discharge as a penalty. The arbitrator, after finding no discrimination, would, however, be faced with such issues.

The arbitral and Board jurisdiction could be divided with the arbitrator empowered to pass only on the issue of "just cause" and with the Board retaining exclusive jurisdiction over issues of discrimination. Although some courts have fragmented the contract issues in this way to avoid the overlap issue,[269] such treatment plainly involves an artificial separation between two interrelated questions. In any close arbitration case the existence of discrimination would manifestly affect the determination of "just cause" and would be litigated even if the arbitrator theoretically lacked jurisdiction to resolve the discrimination issue. Neither the statute nor policy considerations warrant the artificial fragmentation of two related issues or a division of jurisdiction which would call for two proceedings before both issues could be resolved. Nor is there any justification for a rule which might require parties to draft grievances so as to make clear the issues of contract interpretation involved do not overlap with questions of unfair labor practices. Such technical niceties wholly inappropriate to the informality of the grievance process would become important if arbitral jurisdiction, or judicial competence to direct arbitration, were ousted by overlap.

Somewhat greater difficulties of adjusting judicial and administrative competence are involved when a defense against an alleged breach of contract rests on the contention that the apparent breach was provoked, and rendered privileged, by the plaintiff's antecedent unfair labor practices. The problem suggested by *Mastro Plastics Corporation* v. *NLRB*[270] illustrates the difficulties involved. In that case, the Supreme Court ruled that a no-strike clause which in general terms barred all strikes did not apply to a strike in response to the employer's serious unfair labor practices. The Court, accordingly, characterized the strikers' conduct as protected and sustained a Board order reinstating strikers who had been discharged. Antecedent unfair labor practices, such as those involved in *Mastro Plastics* might be invoked as a defense to an action against the union for damages or for injunctive relief, based on breach of contract. The question would then arise as to whether the court itself should determine whether such unfair labor practices were committed or whether it should require the union to raise that issue by filing a charge with the Board, staying the contract action pending an administrative determination. The doctrine of "primary jurisdiction" appears at first glance to call for reference of such specialized questions of fact to the Board,[271] assuming that the statute of limitations has not run and that the Board's jurisdictional yard-

sticks are satisfied. But further analysis suggests doubt as to such a result.

When a union urges that a general no-strike pledge does not bar a strike prompted by particular conduct, the issue raised is strictly, not the proper characterization of the employer's conduct under the LMRA. The issue is whether the employer's conduct is of such character as to justify a construction of the no-strike clause which renders it inapplicable to the strike in question. A no-strike clause may, of course, be inapplicable even though no employer unfair labor practice is involved, for example, when a strike occurs, during the term of a contract after an impasse produced by negotiations concerning wages under a reopening clause. On the other hand, a no-strike clause may be applicable despite the presence of employer unfair practices, for example, where a no-strike clause specifically applies to strikes caused by unfair labor practices. Accordingly, what is decisive in the hypothetical contract action is not the characterization of the employer's conduct under the LMRA but an appraisal of its relationship to the purposes which can reasonably be imputed to the parties. The basic issue thus appears to be one of contract interpretation rather than one which involves the NLRB's specialized competence as to unfair labor practices. The alternative approach to this problem which urges exclusive jurisdiction over activities[272] appears to disregard the essential nature of the issue involved.

Whatever the force of the foregoing analysis or its applicability to other situations,[273] other considerations of convenience and policy support the desirability of avoiding fragmentation of jurisdiction when unfair labor practices are urged as a defense in an action on a collective bargaining agreement. The Board's machinery has been subject to great delays, delays which may be increased by the expansion of the Board's jurisdiction. The fragmentation of jurisdiction would import such delays into contract actions. In all actions on no-strike pledges, defendant-unions might attempt to postpone judicial relief by defenses (meritorious and frivolous) based on alleged unfair practices by the employer. Delay is particularly undesirable in connection with any action to enforce collective bargaining agreements because of the adverse impact of such actions on the parties' continuing relationship and on subsequent negotiations. In the case of action for injunctive relief against strikes and lockouts, there are, of course, special reasons for avoiding the pyramiding of delays. If the Supreme Court should sanction such injunctive relief notwithstanding the Norris LaGuardia Act, its decision would reflect the judgment that the national labor policy calls for a prompt preventive remedy. To defeat such a remedy because of concern for the Board's "primary jurisdiction" would scarcely yield a coherent policy.

The invocation of "primary jurisdiction" in contract actions would, moreover, not be wholly consistent with the Court's decision in other contexts. The Court's direction in *Lincoln Mills* that the new federal law for collective contracts should reflect the policy of the national labor laws implies judicial competence to deal with unfair labor practice problems enmeshed in a contract action. Furthermore, the decision that court actions under Section 303 are independent of Board actions under the parallel provisions of Section 8 (b) 4 of the LMRA strongly suggests a similar recognition of independent judicial competence under Section 301.

The contract actions discussed above all involve situations in which the basic issue turns on the meaning or applicability of the contractual provisions. More troublesome questions of accommodation between judicial and administrative competence are raised where the result in a contract action turns (a) on whether a particular contract clause violates the provisions of the LMRA or (b) on questions of representation.

Such matters involve the specialized insights attributed to the Board rather than the more general insights about the institution of contract attributed to the courts. For example, an employer may defend against an action to restrain, or to grant damages for, his alleged violation of a union-shop-clause coupled with a check-off provision. The issue before the Court is whether the union-shop arrangement satisfies the statutory requirements, i.e., whether the provision on its face or in its application constitutes an unfair labor practice. In such situations, a strong case can be made for the invocation of primary jurisdiction. On the other hand, Section 303 again may be invoked as an indication that where judicial competence is recognized by the statute such competence is not to be fragmented in order to protect the Board's jurisdiction. There is plainly no apparent reason for permitting the courts under Section 303 to adjudicate such complex matters as the scope of vague proscriptions of secondary boycotts while denying their competence to pass on the reach of other provisions which may invalidate contract clauses relied on in an action under Section 301.

There is no easy escape from the dilemma involved. The recognition of complete judicial competence to deal with all questions raised by Section 301 actions will run the risk of results incompatible with, and subject to nullification by, Board determinations. The fragmentation of judicial competence by the invocation of primary jurisdiction will subject the plaintiff to delays in an area where stability in labor relations calls for a prompt remedy. Although the problem

scarcely is an invitation to dogmatism, the importance of a prompt remedy, the implications of the Court's recognition of independent judicial competence under Section 303 and the provision for an apparently similar competence under Section 301, may justify the rejection of "primary jurisdiction" in actions involving the validity of a contract clause under the LMRA. In any event, this approach[274] has the persuasive support of Judge Magruder, speaking for the First Circuit.

The difficulties of accommodating administrative and judicial competence in Section 301 actions are most acute when the validity of an agreement or its enforceability turns on a question of representation. Such questions would, for example, be decisive in the following situations: (1) A defendant (employer or union) may urge that the contracting *but* uncertified union lacked majority support in the appropriate unit when the agreement was executed and that the agreement was consequently invalid.[275] The determination of such questions involves complex administrative standards governing unit determinations and the indicia of majority support—matters which peculiarly involve the Board's competence. (2) During the term of a contract valid *ab initio*, the employees of the unit involved shift their allegiance to a rival union. Such a shift may produce problems as to which union is entitled to administer the old contract. Furthermore if the employer recognizes, and contracts with, the rival, there will be problems as to the impact of the new situation on the predecessor's rights under the old contract.

Where the successor union has been certified by the NLRB, the court can generally resolve issues concerning the right to enforce the old contract or the right to enforce a later and inconsistent contract, without invoking rules within the Board's special competence.[276] Indeed, the Board has abstained from determining such contractual issues even though it certifies a new bargaining agent prior to the expiration of a contract with a predecessor representative.[277] The recognition of judicial competence over such issues is accordingly necessary to avoid a vacuum.

Where, however, no such certification has occurred, determination of rights to enforce the first contract or the effect of a later contract between the employer and an alleged successor union depend on complex and shifting administrative standards regarding "schism" and the lifting of "the contract bar"[278] and the *Mid-West Piping* doctrine.[279] There is no need here to elaborate on these standards. It is enough to note that courts of general jurisdiction may find them somewhat esoteric and not easy to manage, that they peculiarly involve the expertise attributed to the Board.[280] and that determinations concerning breach of contract which involve such issues could be undone by the exercise of the Board's paramount power. Such considerations make a strong case for the invocation of "primary jurisdiction."

It is, however, possible to read Section 301 as a somewhat oblique rejection of that doctrine. That section applies to "suits for violations of contracts between an employer and a labor organization *representing employees in an industry* affecting commerce." [Emphasis added.] The quoted language is extremely puzzling: It does not make clear whether the union is to have representation status as of the time of suit, at the time the agreement was executed, or as of such time or times as are relevant in the light of the issues to be litigated. But the difficulties resulting from inartistic drafting can, in accordance with the mandate of *Lincoln Mills*, be resolved in the light of the policy of the national labor laws. The second ambiguity of the language is more important in relation to "primary jurisdiction": Does the inclusion of the reference to representation in a section creating judicial competence imply that the courts, rather than the Board, are to resolve representation issues relevant to the contract issues involved. That view has been advanced by Judge Magruder, speaking for the First Circuit.[281] It is, however, doubtful that the puzzling language of Section 301 would justify the rejection of "primary jurisdiction" if its application appears justified by an appraisal of the competing interests involved. Indeed, the language quoted above may be dismissed as disclosing nothing about the legislative purpose concerning a relatively sophisticated concept, such as "primary jurisdiction"; that language, after all, may be read as representing only an effort, inartistically executed, to limit Section 301 to cases "involving commerce."

The distinctions suggested above between issues of contract interpretation and genuine issues of primary jurisdiction are complex. Perhaps they are unduly complex. Perhaps the complexities should be avoided by reading Section 301 as a mandate to the courts to decide whatever unresolved issues must be decided to dispose of a claim for breach of contract. Such an expansive view of judicial power would involve the courts in complex and specialized issues,[282] but it would also reduce the possibilities that undue preoccupation with so-called "expertise" and with "uniformity" would result in denying prompt and comprehensive relief, and in some cases, all relief.

Those whose patience has brought them this far may feel a sense of despair about the complexities and the paradoxes involved in the accommodations between federal and state power over labor relations (or involved at least in this paper). In a period bristling with primitive denunciation of the Supreme

Court it is appropriate to say again that these problems have not been created by the Court. They result in part from the complexities of a federal system, which are magnified in a "field," such as labor relations, which intersects with so many activities and implicates such diverse forms of regulation. They result also from the default of Congress with respect to fundamental issues whose solution determines how and by whom a modern economy should be governed and, indeed, in some situations whether it is to be governed at all.

In the context of labor relations, the judicial process is a doubtful instrument for filling the policy and power vacuum left by Congress. The problems involved are highly charged and political in every legitimate sense. Under the current statute, the Court, no matter how it decides, cannot escape the charge that it is preferring one powerful interest over another. The problems do not, moreover, lend themselves to solution by comprehensive formulas which the Court tends to lay down to reduce case-by-case tests of preemption and to rationalize policy judgments in terms of the legislative will. Thus, for example, the role of the states with respect to strikes for higher wages might well be different from their role as to strikes to impose geographical trade barriers or to prevent technological innovation. But the Court's formula and the Court's processes are not adequate to the task of making such functional adjustments.[283]

It may be that, despite the defects of the judicial process, the issues of federalism in labor relations must be left to the Court because they are too complex for legislative determination or compromise. Certainly, the lack of federalist sophistication in the Taft-Hartley Congress and the subsequent legislative paralysis support such a judgment. But a decade of litigation and debate have at least identified the principal issues at stake. The issues are ripe for Congressional determination. Specific Congressional solutions may turn out to be "unwise" or inept. But they would at least be wise in the sense that they would reflect a healthy tradition under which political decisions are made and changed by avowedly political agencies.

[1] See Hays, Federalism and Labor Relations in the United States, 102 Univ. of Pa. L. Rev. 959, 961 (1954).

[2] International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) v. Russel, 356 U. S. 634, reh. den. 357 U. S. 944 (1958), the Chief Justice and Mr. Justice Douglas, dissenting, and Mr. Justice Black not participating.

[3] International Association of Machinists v. Gonzales, 356 U. S. 617, reh. den. 357 U. S. 944 (1958), with the Court divided as in *Russel.*

[4] A far from exhaustive list of useful and comprehensive articles includes: Cox and Seidman, Federalism and Labor Relations, 64 Harv. L. Rev. 211 (1950); Gregory, Constitutional Limitations on the Regulation of Union and Employer Conduct, 49 Mich. L. Rev. 191 (1950); Hall, The Taft-Hartley Act v. State Regulation, 1 J. Pub. L. 97 (1952); Petro, Participation by the States in the Enforcement and Development of National Labor Policy, 28 Notre Dame Law. 1 (1952); Ratner, Problems of Federal-State Jurisdiction in Labor Relations, 5 N. Y. U. Ann. Lab. Conf. 77 (1952); Rose, the Labor-Management Relations Act and the State's Power to Grant Relief, 39 Va. L. Rev. 765 (1953); Cox, Federalism in the Law of Labor Relations, 67 Harv. L. Rev. 1297 (1954); Hays, op. cit., supra n 1; Bernstein, Complement or Conflict: Federal-State Jurisdiction in Labor-Management Relations, 3 How. L. J. 191 (1957); Isaacson, Federal Preemption under the Taft-Hartley Act, 11 Ind. and Lab. Rel. Rev. 391 (1958); Reilly, States Rights and the Law of Labor Relations, in Labor Unions and Public Policy 93, pub. by the American Enterprise Ass'n. (1958).

[5] It should be noted that while state power over labor relations "affecting commerce" was being preempted, state power to formulate labor policy (absent commerce or preemption) was being expanded by limitations on the doctrine that picketing was "free speech" protected against state regulation by the 14th Amendment. The free speech cases are summarized in Int. Bhd. v. Vogt, 354 U. S. 284 (1957).

[6] See generally, Stern, The Commerce and the National Economy, 59 Harv. L. Rev. 645, esp. 674 et seq. (1946); Hays, supra, note at 961 et seq.; Cox, supra, note 4, at 1298 et seq.

[7] See generally, The Discretionary Jurisdiction of the NLRB, 71 Harv. L. Rev. 527 (1958).

[8] See NLRB v. Fainblatt, 306 U. S. 601, 607 (1939); Polish National Alliance v. NLRB, 322 U. S. 643, 647 (1944). These cases are discussed more fully *infra,* in text accompanying note 189.

[9] See Smith, The Taft-Hartley Act and State Jurisdiction over Labor Relations, 46 Mich. 593, 606 (1948).

[10] See Hill v. Florida, 325 U. S. 538 (1945), discussed in text *supra* accompanying note 28, and Allen-Bradley Local v. Board, 315 U. S. 740, 750-51 (1942).

[11] 61 Stat. 136 (1947), as amended by 62 Stat. 991 and 1286 (1948), 63 Stat. 880 (1949) and 65 Stat. 601 (1951), 29 U. S. C. §§ 141-197; "Taft-Hartley" and the "LMRA" will be used interchangeably here.

[12] See LMRA; § 1(a), "Declaration of Policy"; Section 1 and Section 7.

[13] See LMRA, § 8(b).

[14] See Millis & Brown, From the Wagner Act to Taft-Hartley; p. 271 et seq. (1950).

[15] See LMRA, §§ 8(b)(3), 8(d).

[16] See LMRA, 301.

[17] See Hays, supra, note 1, at pp. 965, 966, quoting Mr. Hartley, who said in reply to a question about the effect of the federal act on the Wisconsin law: ". . . this will not interfere with the State of Wisconsin in the Administration of its own law." 93 Cong. Rec. 6383 (1947); see also, e.g. remarks of Senator Pepper, 2 Legislative History of the Labor-Management Relations Act 1947 (pub. by NLRB) hereinafter cited as "Legis. Hist." 1379-80 (1948), implying preservation of state injunctive power. But cf. House Rept. No. 245 on H. R. 3020, 80th Cong. 1st Sess. p. 40, 44, 1 Legis. Hist. 331, 335. For a general discussion of the legislative history as it bears on preemption problems, See Smith, supra, note 9, passim, but cf. Cox and Seidman, supra, note 4.

[18] Congress dealt explicitly with federalist problems in Section 14(a), dealing with supervisors; in Section 14(b), dealing with state regulation of union-security arrangements; in Section 8(d) (3), prescribing notice of a bargaining impasse to state mediation services and in Section 10(a), prescribing the conditions for cession by the NLRB of its powers to the states.

[19] Before turning to these categories, it is convenient merely to note that the Court has made it clear that state agencies are ousted of jurisdiction over representation cases "affecting commerce," without regard to whether the state criteria conflict or coincide with the pertinent federal standards. See Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U. S. 767 (1947); LaCrosse Tel. Corp. v. Wisconsin Employment Relations Board, 336 U. S. 18 (1949). See also Guss v. Utah Labor Board, 353 U. S. 1 (1957). For a discussion of the representation cases, see Cox and Seidman, *supra* note 4, at 212 et. seq.; and note 47, infra.

[20] For a thoughtful treatment of the problems involved, see Cox, The Right to Engage in Concerted Activities, 26 Ind. L. Journ. 319 (1951).

[21] See C. G. Conn, Ltd. v. NLRB, 108 F. 2d 390 (7th Circ., 1939); Int. Union, UAWA, A.F.L., Local 232 v. Wisconsin Employment Relations Board, 336 U. S. 245, 257 et. seq. (1949).

[22] See NLRB v. Sands Mfg. Co. 306 U. S. 332 (1939).

[23] See NLRB v. Local Union No. 1229, Int'l. Bhd. of Elec. Workers, 346 U. S. 464 (1953).

[24] See NLRB v. Electronics Equip. Corp. 205 F. 2d 296 (2nd Circ. 1953).

[25] Southern S. S. Co. v. NLRB, 316 U. S. 31 (1942).

[26] NLRB v. Fansteel Metallurgical Corp. 306 U. S. 240 (1939).

[27] The Committee reports were equally silent on this issue. See Smith, supra, note 9, at 606.

[28] 325 U. S. 538 (1945). Frankfurter, J., dissented in an opinion concurred in by Roberts, J.; Stone, C. J., dissented in part.

[29] The Court recently invoked the 14th Amendment rather than preemption to invalidate a similar but harsher local regulation. See Staub v. City of Baxley, 355 U. S. 313 (1958), Frankfurter, J., joined by Clark, J., dissenting on procedural grounds.

[30] As Mr. Chief Justice Stone forcefully urged in his partial dissent, this consideration did not justify the invalidation of the Florida requirement for annual reports by a labor organization, giving the names and addresses of its officers and location of its office. The Court, although conceding that this requirement was compatible with the national scheme, invalidated it on the curious ground that the imposition of punishment for non-compliance would create an obstacle to collective bargaining. See 325 U. S. at 543. A *reductio ad absurdum* of this argument would be a holding that state criminal laws against theft of union property, although not in conflict with the federal act, could not be enforced against union officials because enforcement would interfere with employee free choice and collective bargaining.

[31] The dim future for state regulation was, however, noted in State Regulation of Labor Unions, 55 Yale L. J. 440, 455 (1946).

[32] In a supplemental Senate report on the bill which after amendment became the LMRA, the late Senator Taft referred to Hill v. Florida as posing important questions of accommodating Federal and State legislation. See Sen. Rep. No. 105 on S 1126, 80th Cong. 1st Sess. 6, 1 Legis. Hist. of LMRA 412. This reference occurred in connection with a discussion of whether the federal act would permit a union-shop in states illegalizing such arrangements. Subsequently, the union-security problem was dealt with by a specific recognition of state power in Section 14(b) of the LMRA.

[33] See Ratner, Problems of Federal-State Jurisdiction in Labor Relations, 5 N. Y. U. Ann. Lab. Conf. 77, 82, 94 (1952); but cf. Petro, Participation by the States in the Enforcement and Development of National Labor Policy, *id.* at p. 1.

[34] International Union v. Wisconsin Employment Relations Board, 336 U. S. 245, 252 (1949). It should be noted that in *Briggs-Stratton* and in all of the cases prior to the *Guss* case (see text, *infra*, accompanying n. 169), the Court in invalidating state regulation, carefully noted that the enterprise involved was one over which the NLRB would customarily exercise jurisdiction. The *Guss* case obliterated any distinction based on the Board's declination of its statutory jurisdiction.

[35] This statement was supported by the assertion that the federal act proscribed strikes only because their objectives, as distinguished from their means, were illegal. *Id.* at p. 253. That assertion was plainly in error. See § 8(b)(1)A of the LMRA and United Const. Workers v. Laburnum Const. Corp., 347 U. S. 656 (1954).

[36] The Court declared: "In the light of labor movement history, the purpose of the quoted provision of the statute (§ 7) becomes clear. The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the National Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert. But because legal conduct may not be made illegal by concert, it does not mean that otherwise illegal action is made legal by concert." 336 U. S. at pp. 257-58.

[37] In view of the suggestion in the *Weber* case, discussed in text, *infra*, accompanying n. 57, that the *possibility* that conduct is federally prohibited excludes state action, it should be noted that similar harassing tactics during negotiations were held by the NLRB to be in violation of Section 8(b)(3) of the LMRA. Textile Workers Union of America, 108 NLRB 743 (1954), enforced in part, set aside in part, in Textile Workers Union v. NLRB, 227 F. 2d 409 (App. D. C., 1955), cert. granted, 350 U. S. 1004 (1956), grant vacated, 352 U. S. 864 (1956), apparently because a new union had been certified.

[38] 339 U. S. 454 (1950).

[39] Id. at 456-58. It is not entirely clear from this passage whether the Court was relying on "conflict" or "occupation of the field." In the last paragraph of the opinion, the Court highlighted the "conflict" theme by referring to the *Briggs-Stratton* principle as "controlling." Id. at 459.

[40] 340 U. S. 383 (1951).

[41] Id. at 394.

[42] Thus the Court declared: "We deal only with the question of conflicting federal legislation as we have found that issue dispositive of both cases." Id. at 388-389.

[43] Id. at 407.

[44] Cf. Frankfurter, J., dissenting 340 U. S. at 404; see also discussion in text accompanying note 79.

[45] Cf. Hays, supra note 1, at 964, 965-66, urging that the Court misinterpreted the Congressional intent on which it so heavily relied.

[46] 338 U. S. 953 (1950).

[47] The opinion cited Bethlehem Steel Co. v. New York Labor Board, 330 U. S. 767 (1947) and La Crosse Telephone Corp.

v. Wisconsin Employment Relations Board, 336 U. S. 18 (1949); see note 19 supra for reference to discussions of these cases. In these two cases, the Court recognized the NLRB's exclusive jurisdiction over representation questions in any business subject to the Board's effective jurisdiction. Since a state decision, even though based on criteria consistent with the federal criteria, might establish a representation pattern incompatible with federal policy and since such patterns have continuing consequences under the federal Act, the Court found "the situation too fraught with potential conflict to permit intrusion of the state agency, even though the National Board had not acted in the particular case." The Court's summary reliance on these cases ignored the problems raised by the explicit recognition in Section 14(b) of the LMRA of state competence over union-security arrangements and by the legislative history of that section, which suggested that state jurisdiction over such arrangements was not to be impaired. See discussion infra in text accompanying note 125 et. seq. § 48. See Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U. S. at 390. Cf. the explanation of *Plankington* by Frankfurter, J., as involving an overlap of federal and state unfair labor practices, id. at 402.

[49] Discussed in text accompanying note 38 supra.

[50] 346 U. S. 485 (1953).

[51] 373 Pa. 19, 94 A.2d 893 (1953).

[52] 346 U. S. at 488.

[53] 348 U. S. 468, 475, 479 (1955).

[54] 347 U. S. 656, 663, 665 (1954).

[55] The Supreme Court's intimation in *Garner* that the union's conduct violated Section 8(b)(2) of the LMRA (see 346 U. S. at 488-89) apparently resulted from a stipulation to that effect by the parties. See Respondent's brief, p. 15; Petitioner's brief, p. 15, 84. That stipulation was, however, not justified by the record read in the light of the NLRB precedents, and it appears unfortunate that the brief of the NLRB, as *amicus curiae*, accepted the parties' stipulation (p. 2,8 of brief) as a basis for the Board's argument for preemption, p. 28. A finding of a Section 8(b)(2) violation would have been justified under those precedents only if the picketing had been directed at achieving a closed or union shop. See American Newspaper Publishers v. NLRB, 190 F. 2d 45 (7th, cir. 1951); Mine Workers v. NLRB, 184 F. 2d 392 (App. D.C., 1950). But such a purpose on the part of the union had not been alleged, (U. S. Sup. Ct. Record, pp. 4a-7a) or found by the trial court. The Chancellor found that the union had been engaged solely in organizational picketing and that it had not requested recognition, let alone a closed shop. See U. S. Sup. Ct. Record, p. 173a, 174a, 176a, 180a. Under the prevailing NLRB precedents, minority picketing, whether for recognition or organizational purposes, had not been held to be an unfair labor practice under the federal act. See Federal Versus State Jurisdiction over Stranger Picketing, 20 Chi. L. Rev. 109, 112-113 (1952) and the extended discussion of this problem in Curtis Brothers Inc., especially the dissenting opinion of Member Murdock, 119 NLRB No. 33, 41 LRRM 1025 (1957). It is an ironic commentary on the Court's careful respect for the Board's primary jurisdiction that the Board in its precedent-shattering holding in *Curtis* (that recognition picketing by a minority union immediately after it had lost an election violated §8(b)(1) of Taft-Hartley) relied on the *Garner* case to support its result.

[56] 346 U. S. at 499-500.

[57] 348 U. S. 468 (1955).

[58] *Id.* at 471, 477.

[59] *Id.* at 478.

[60] See note 56 supra and accompanying text.

[61] ". . . even if it were clear that no unfair labor practices were involved, it would not necessarily follow that the state was free to issue its injunction. If this conduct does not fall within the prohibitions of §8 of the Taft-Hartley Act, it may fall within the protection of §7, as concerted activity for the purpose of mutual aid or protection." 348 U. S. at 478-79. Query: Is "concerted activity" here being used to describe activity protected against employer reprisal or, as *Garner* suggested, activity not subject to federal prohibition? 'In this connection, cf. the statement by Frankfurter, J., in the Court's opinion,' in Algoma Plywood v. Wis. Bd., 336 U. S. 301, 313 (1949): "Where the State and federal laws do not overlap no cession is necessary because the State's jurisdiction is unimpaired."

The *Weber* opinion also emphasized that the plaintiff had alleged in the state proceedings that the conduct complained of was a federal unfair labor practice. See 348 U. S. at 479, 481. Under the broad implications of the language of *Garner*, such allegations would be of no importance since the states would be excluded regardless of state overlap with federal remedies or state encroachment of activities protected by Section 7 of the LMRA.

Perhaps, the limitation of *Garner* adumbrated in *Weber* moved Mr. Justice Black, an exponent of broad preemption with respect to labor relations, to concur in result only.

[62] *Weber* did not, however, refer to the intimation in *Briggs-Stratton* that the states were limited to regulating the means, rather than purposes, of union conduct. See supra, note 36. Since the union indulged in a peaceful strike, that limitation, if controlling, would have disposed of the case.

[63] That concept is indirectly applicable because employees who participate in conduct which constitutes an unfair labor practice by a union are normally divested of statutory protection vis-a-vis their employer.

[64] See, e.g., Ratner, supra, note 33 at 97-98 (1952); Cox, supra, note 4, at 1318-19.

[65] See, e.g., Cox, supra, note 4, at 1314-15. But see Isaacson, supra, note 4, at 393 (1958).

[66] See Hays, supra, note 1 at 964-65; see also, e.g., 2 Legis. Hist., 1195, 1208, 1379-80, 1019-20; but cf. e.g., id. at 1561 where Senator Morse challenged Section 14(b) and urged a national policy with respect to union-security arrangements; House Rept. No. 245 on HR 3020, 1 Legis. Hist. 331. It is also worth noting that opponents of the legislation objected on the ground that federal regulation increased the centralized national power. It may be significant that such criticism was couched in terms of encroaching on or duplicating traditional state power and not in terms of displacing it. See 2 Legis. Hist. 1258, 1 ibid. 356, 2 ibid. 1385, 1261, 1262, 1264, 1266.

[67] See Hays, supra, note 1, at 965-66.

[68] See Cox, supra, note 4, at 1315 et seq.

[69] Federal legislation is generally interstitial and "builds upon legal relationships established by the states, altering or supplanting them only so far as is necessary for a special purpose." Hart and Wechsler, The Federal Courts and the Federal System, p. 435 (1953).

[70] See, e.g., Ratner, supra, note 4 at 104, et. seq.

[71] For example, Cox, prior to the *Amalgamated* decision (discussed supra in text accompanying supra, note 46) urged that the Wisconsin anti-strike regulation be upheld (see Cox & Seidman, supra, note 4, at 240-41), despite the difficulty of reconciling such a result with the language of the *Obrien* case. After the *Amalgamated* decision Cox proposed narrowly drawn legislation which would reinstate state power. See Cox, op. cit. n. 4, at p. 1320-21. Furthermore, notwithstanding the fine lines involved, Cox has also proposed a distinction, for preemptions purposes, between state labor regulation, as such, and

general regulation which impinges on labor relations. The problems presented by such a distinction are discussed infra in text accompanying note 148 et seq.,

[72] Cf. the use of such a standard by the Supreme Court in determining both the extent of the commerce power and of the NLRB's statutory jurisdiction. See, e.g., Polish Alliance v. NLRB, 322 U. S. 643, 648 (1944).

[73] See 2 Legis. Hist. 1005-07.

[74] See text, infra , accompanying n. 149 et. seq.

[75] 119 NLRB No. 33, 416 LRRM 1025 (1957), The Board's decision has not yet been upheld by the courts, and there are, of course, serious doubts that it will be affirmed by the Supreme Court.

[76] Total preemption yields similar results where the employer, faced with conflicting representation claims by rival unions is picketed for immediate recognition by one of the rivals while the NLRB is processing the rival claims. Although recognition by the employer has been held to be an unfair labor practice, the picketing as yet has not been held to be an unfair labor practice. Cf. Curtis Bros., 119 NLRB No. 33, 41 LRRM 1025 (1957). Under such circumstances some state courts, prior to *Garner*, relieved the employer from the conflicting pressures of the LMRA and picketing by enjoining the picketing. See, e.g., Goodwins v. Hagedorn 303 N.Y. 300, 101 N.E. 2d 697 (1951).

[77] The Court, in a divided opinion, denied the jurisdiction of federal district courts to restrain, at the instance of private parties, the enforcement of state injunctions. Amal. Clothing Workers of America v. The Richman Brothers, 348 U. S. 511 (1955). Cf. Capital Service Inc. v. NLRB 347 U. S. 501 (1954) (sustaining jurisdiction of the federal district courts to restrain, at the instance of the NLRB, enforcement of state injunctions after the NLRB has issued a complaint covering the conduct subject to state court injunction). But in *Richman Bros.*, the Court invited efforts by the NLRB to develop methods for barring enforcement of state injunctions against protected activities, stating: ". . . it has not yet been determined that if an employer resorts to a state court in relation to conduct that is obviously taken over by the Taft-Hartley Act and outside the bounds of state relief, it may not under appropriate circumstances give ground for a finding of an unfair labor practice." (See 348 U. S. at 520-21; citing W. T. Carter and Brother, 90 NLRB 2020 (1950). In *Carter*, the Board, with Chairman Herzog, dissenting, held that an employer's resort to state court proceedings to enjoin protected conduct was an unfair labor practice: Even the dissenter recognized the Board's paramount authority notwithstanding the state injunction and acquiesced in the Board's order directing the employer to request the state court to vacate or modify the injunction to conform it to the Board's decision.

[78] See Youngdahl v. Rainfair, 355 U. S. 131 (1957), discussed infra in text at note 90.

[79] See Allen-Bradley Local v. Wisconsin Board 315 U. S. 740, 749 (1942); United Construction Workers v. Laburnum Construction Company, 347 U. S. 656, 664, 669-70 (1954).

[80] See Warren, C. J., dissenting in Int. Union, United Automobile, Aircraft and Agricultural Workers v. Russel, 356 U. S. 634, 649(1958).

[81] 347 U. S. 656 (1954).

[82] 194 Va. 872, 885, 894, 75 S.E. 2d 694, 703, 709 (1953).

[83] 347 U. S. 656, 663-64 (1954). The Court referred to the civil liabilities imposed by Section 303 of the LMRA but concluded that that provision, instead of impliedly excluding other damage recoveries, made it inconsistent to deny recovery for the more flagrant conduct, such as violence. *Id.* at 666.

[84] *Id.* at 668-69. The Court referred to a statement by the late Senator Taft, which approved the duplication of federal and state remedies for violence. This reference has been criticized on the ground that the Court omitted a prior statement by the Senator which reflected the assumption that state law did not reach intimidation which fell short of physical violence. See Bernstein, Complement or Conflict: Federal-State Jurisdiction in Labor-Management Relations, 3 How. L. J. 191, 213 (1957). Bernstein argues that this assumption, together with the Senator's assumption, that there would be federal and state duplication only in "extreme cases" indicates that the Senator was suggesting only that the LMRA might duplicate state criminal law. Although there is some ambiguity in the language relied on by the Court, other portions of the legislative history reflect the understanding of both proponents and opponents of the statute that the states could deal with mass picketing and other threats of violence by means of civil remedies. See, e.g., 2 Legis. Hist. 1395-96 (Sen. Taft), 1021.

[85] The Court in *Laburnum* also relied on the notion that state jurisdiction was aided by the fact that private rather than public rights were being vindicated. 347 U. S. at 665. This distinction had, however, been dismissed as unimportant, in *Garner*. See 346 U. S. at 498-500.

[86] The Court cited the following: Note, Labor Law—Federal and State Jurisdiction—Common Law Remedies, 27 N.Y.U. L. Rev. 468; Cox & Seidman, supra, note 4, at 236.

[87] See Cox, Federal-State Jurisdiction in Trends in Labor-Management Relations, 139, 148 (Univ. of Wisconsin. Industrial Relations Institute 1956).

[88] 351 U. S. 266 (1956).

[89] *Id.* at pp. 274-75.

[90] 355 U. S. 131 (1957).

[91] In an election held about 5 months after the strike began, a majority of the employees voted against representation by the union. See *id.* at 133, note 1.

[92] *Id.* at 132-133.

[93] The Court in rejecting the contention that the concerted activities were protected cited Chaplinsky v. New Hampshire, 315 U. S. 568, 571-72 (1942), thereby creating some ambiguity as to whether it was concerned with protection of free speech under the Fourteenth Amendment or the protection conferred by the LMRA. It seems fair, however, to read the opinion as dealing with statutory protection.

[94] Under the Board's precedents, the threats and minor vandalism of the strikers were clearly unprotected, but their abusive language, which the Court indicated could be restrained, raised a different question. See NLRB v. Longview Furniture Co., 206 F.2d 274 (4th Cir., 1953), modifying a Board order insofar as it required reinstatement of striking employees who had been discharged for "hurling obscene and insulting epithets" at nonstrikers in an attempt to keep them from working. The Board had ordered reinstatement on the ground that the strikers had not violated the etiquette appropriate for the picket line. See Longview Furniture Co., 100 NLRB 301, 304 (1952).

[95] 356 U. S. 634 (1958).

[96] See *id.* at 641, note 5.

[97] *Id.* at 643.

[98] *Id.* at 642-643.

[99] *Id.* at 642.

[100] *Id.* at 644.

[101] *Ibid.*

[102] *Id.* at 650.

[103] *Id.* at 654, quoting *Unit. Const. Workers v. Laburnum*, 347 U. S. 656, 671 (1954).

[104] See Traynor, J., dissenting in Garmon v. San Diego Building

Trades Council, 49 Cal. 2d 595, 615, 619-620, 320 P. 2d 473, 485, 488 (1958).

[106] 49 Cal. 2d at 618, 320 P. 2d at 487.

[108] See 346 U. S. at 488.

[107] See United Construction Workers v. Laburnum, 347 U. S. 656 at 668 (1954); San Diego Bldg. Trades Council v. Garmon, 353 U. S. 26, 29 (1957).

[108] See text at note 84.

[109] See 356 U. S. at 642.

[110] See Abounader v. Strohmeyer & Arpe Co., 243 N. Y. 458, 465, 154 N.E. 309, 311 (1926); see generally, Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914); Jaffe, The Public Right Dogma in Labor Board Cases, 59 Harv. L. Rev. 720, 734 et. seq. (1946).

[111] It should be observed that the arrangements with the incumbent union in the *Laburnum* case provided for exclusive hiring of skilled workers through the AFL unions and for the unions' consent to the employer's hiring of unskilled workers who were unorganized. See 347 U. S. at 660, note 4. The arrangement, which appeared to contemplate either a closed shop or the preferential hiring of unionized workers, was illegal under the LMRA. This consideration does not, in my opinion, affect the validity of the result in *Laburnum* since violent self-help to remedy violations is scarcely justifiable in view of the orderly remedies afforded by LMRA. But cf. Bernstein, supra, note 84, at pp. 211-12. Nevertheless, the probable illegality of the arrangements between the incumbent unions and the employer in *Laburnum* is an additional reason for questioning the force attached by the dissenters to the fact that an incumbent union as well as the employer was the object of the rival union's violence in *Laburnum*.

[112] See note 80, supra.

[113] The overlapping state and federal jurisdiction recognized in *Russel* may give rise to troublesome questions as to the effect in a NLRB proceeding of a prior state judgment and the effect in a state proceeding of a prior NLRB determination. This footnote, which has not been preceded by a comprehensive examination of the authorities, is designed only to raise these questions.

A state determination that a union's conduct was violent would not appear to be binding in a subsequent Board proceeding arising from a charge that the employer had violated the LMRA by disciplining employees who had participated in the assertedly non-violent activities. Under familiar doctrines concerning collateral estoppel, the General Counsel of the NLRB, not having been a party to, or in control of, the state litigation, would not be bound by the state judgment, quite apart from questions which might exist concerning identity of issues. Cf. *Matter of N.Y. State Labor Relations Bd. v. Holland Laundry*, 294 N.Y. 480, esp., 489-95, 63 NE 2d. 68 72-75 (1945), mot. for rearg. denied 295 N.Y. 568 (1946). Furthermore, collateral estoppel of the NLRB would appear to be precluded by the provision of Section 10 (a) of the LMRA, that the Board's powers shall not be affected by any other means of adjustment. Cf. Judge Learned Hand in *Lyons v. Westinghouse Electric Corp.*, 222F 2d 184 (2d Circ., 1955), cert. denied 350 U. S. 825 (1955), noted in 55 Col. L. Rev. 1078 (1955).

Nevertheless, Judge Magruder has suggested without deciding, that "a holding that the Board is bound by the findings in the state injunction proceeding might perhaps be justified" in that it might "facilitate the reestablishment of labor stability in the disrupted plant." See *NLRB* v. *Thayer Co.*, 213 F.2d 748, 754 (1st Circ. 1954). In view of the provisions of Section 10(a) and the importance attached by the Supreme Court to uniform and centralized administration of the LMRA, it seems unlikely that conventional requirements of collateral estoppel would be relaxed so as to give binding effect in a NLRB proceeding to prior state determinations which are invoked against the Board.

More troublesome is the problem presented by the converse situation, i.e., whether an explicit or implicit Board determination that conduct is protected is binding in a state proceeding arising out of a claim that the conduct in question was violent, unprotected, and, therefore, within the state's jurisdiction. Even though the party asserting the state claim had been the charging party before the Board, the fact that control of the Board proceeding is vested in the General Counsel would appear to negate the "privity" generally required for collateral estoppel. See *Boeing Airplane Co.* v. *Aeronautical Industrial District Lodge*, 188 F.2d 356 (9th Cir., 1951). Nevertheless, in the light of *Garner*, it would be strange to permit a state to award damages for conduct previously characterized as protected by the Board. *Garner* preempted state jurisdiction in part to avoid the possibility of state interference with activities which might be found by the Board to be protected. To sanction state action against conduct previously characterized as protected by the Board would appear to be incompatible with the purposes behind *Garner* and other preemption cases. But due process considerations, as well as orthodox collateral estoppel requirements, would present serious obstacles to a holding that a party to a state proceeding is bound by a previous characterization of conduct in a national proceeding to which he was not a party. But such obstacles might be avoided on the ground that the national government, which could completely oust state jurisdiction, can so condition its exercise as to avoid encroachment on activities determined by the NLRB to be protected. Such an approach would in turn invite the contention that an unconstitutional condition was being imposed on state jurisdiction. Prediction in this situation is obviously hazardous. But national characterization of conduct may well be held controlling in a subsequent state proceeding in order to implement the purposes implicit in the preemption decisions. In any event, the exercise of state jurisdiction in such situations will, of course, be subject to review by the Supreme Court if it is urged that state action encroaches on protected activities.

Interesting complications also arise where a prior Board or state determination is offered against a party to the earlier proceeding. For example, a finding by the Board that a union, defendant in a Board proceeding, was guilty of violence, may be offered against that union defending a state action for damages. The absence of mutuality would not in some jurisdictions preclude a holding that the defendant in the state action is bound by the prior Board determination. See Currie, Mutuality of Collateral Estoppel; Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281 (1957). Nevertheless, a state might reject such a result on the ground that it would be incompatible with its "exclusive jurisdiction" over the cause of action involved. Cf. Judge Learned Hand in *Lyons* v. *Westinghouse Corp.*, 222 F. 2d 184 (2nd Cir., 1955). Federal jurisdiction in diversity actions, over such state created rights could be reconciled with the claim of the state's "exclusive jurisdiction" on the ground that a federal court, under the *Erie* doctrine, is an arm of state law.

In the converse situation, the Board would appear to be barred by the provisions of §10(a) of the LMRA from binding a defendant in a Board proceeding by a finding against him as defendant in an earlier state proceeding.

[114] 45 Cal. 2d 657, 291 P2d 1 (1955).

[115] San Diego Bldg. Trades Council v. Garmon, 353 U. S. 26, 29 (1957).

[116] Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958).

[117] San Diego Bldg. Trades Council v. Garmon, 357 U. S. 925 (1958).

[118] See text supra at notes 75-76.

[119] See text supra, following note 64.

[120] See Traynor, J. dissenting in Garmon v. San Diego Building Trades Council, 320 P.2d 473, 485, 486-87.

[121] The express provision for jurisdiction in §303 invites the *inclusio unius* argument. But that argument is far from persuasive. The provision for judicial remedies embodied in Section 303 reflected the strong Congressional disapproval of the secondary and other pressures proscribed in that section. The explicit provision in LMRA for state and federal competence over damage actions for conduct deemed particularly obnoxious by the Congress indicates only that damages were to be granted for such conduct despite varying state rules as to the legality of such conduct. It does not indicate that all other state damage remedies for non-violent conduct were to be ousted regardless of the impact of the conduct on the federal purposes and of the remedial gaps in the federal scheme. Plainly, both *Laburnum* and *Russel* reject any mechanical *inclusio unius* argument based on Section 303.

[122] United Brick & Clay Workers of America v. Deena Artware Inc., 198 F. 2d 637 (6th Cir. 1952), cert. denied, 344 U. S. 897 (1952); International Longshoremen's Union v. Juneau, 342 U. S. 237 (1952).

[123] See text supra, following note 20.

[124] See text supra, at note 20.

[125] Curtis Bros. 119 NLRB No. 33, 41 LRRM 10 25 (1957), might be extended to deal with this situation.

[126] Relevant extracts are set forth in Algoma Plywood and Veneer Co. v. Wisconsin Employment Relations Board, 336 U. S. 301, 307-310 (1949).

[127] §14(b) provides: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

§14(b) might be read as bringing into play the federal prohibition against discrimination embodied in §8(a)(3) and 8(b)(2) of the LMRA when union-shop arrangements violate state law. The proviso to §8(a)(3) interposes, however, technical difficulties in the way of such an interpretation. It provides that . . . "nothing in this Act or in any other statute of the United States, shall preclude an employer from making" union-security agreements which conform to the requirements imposed by Taft-Hartley. Furthermore, the legislative history of §14(b) (see supra, note 126) suggests that Section 14(b) was not designed to incorporate state law into the LMRA but only to authorize state invalidation of union-security agreements permitted by the LMRA.

[128] H.R. 3020, 80th Cong. 1st Sess., which, after amendment, became the LMRA, provided in §13 that union security arrangements were "divested of their character as a subject of regulation by Congress under its power to regulate commerce . . . to the extent that such agreements shall, in addition to being subject to any applicable provisions of this Act, be subject to the operation and effect of such state laws and constitutional provisions as well." See 1 Legis. Hist., pp. 80-81; see also House Rept. on H.R. 3020, 80th Cong. 1st Sess. p. 34, 44, 1 Legis. Hist. 320, 335. The provision which was ultimately embodied in §14(b) was agreed to in the course of Conference to reconcile the House bill and the Senate bill which did not contain a corresponding provision. The House Conf. Rept. stated: "It was never the intention of the National Labor Relations Act . . . to preempt the field . . . so as to deprive the States of their powers to prevent compulsory unionism. . . . To make certain that there should be no question about this, Section 13 was included in the House bill. The Conference agreement, in Section 14(b), contains a provision having the same effect." House Conf. Rept. No. 510, on H.R. 3020, 80th Cong., 1st Sess. p. 60 (1947), 1 Legis. Hist., 564. Subsequently, in the debates Senator Ball referred to the provisions embodied in §14(b) as "new" and to "the compromise in the House on language spelling it out." 2 Legis. Hist. 1546. Senator Taft replied: "The Senate Committee report stated on its face that State laws would still remain in effect. All we have done is to write in expressly what our committee report said." Ibid. No statement in the Senate Committee Rept. on S 1126 (Sen. Rept. No. 105, 80th Cong. 1st Sess.) has been found which has the tenor suggested by Senator Taft. Cf. p. 6 of that report. 1 Legis. Hist. 412-413, which Senator Taft apparently had in mind. See 2 Legis. Hist. 1596-97. Nevertheless, his statement on the floor is wholly consistent with concurrent state power and the statement in the Senate Committee report is not inconsistent with such power.

[129] Senator Taft stated that the LMRA did not "in any way prohibit the enforcement of State laws which already prohibited closed shops." See 2 Legis. Hist. 1597.

[130] See supra, text at note 47.

[131] See supra, text at note 48. It should be noted, however, that the Court, relying on the legislative history to justify its departure from the literal language of §14(b) (quoted supra note 127) sanctioned state regulations which, instead of prohibiting union-security arrangements, imposed requirements supplementing those imposed by the LMRA. See Algoma Plywood and Veneer v. Wisconsin Emp. Relations Board, 336 U. S. at 314. The NLRB appears, however, in at least one case to have neglected the implications of this decision. See Cyclone Sales Inc., 115 NLRB 431 (1956).

[132] International Association v. Gonzales, 356 U. S. 617 (1958).

[133] The "contract theory" of the union constitution has been criticized as a fiction which disregards the fact that the constitutional provisions are unduly vague, are not the product of consensus or negotiation, and are frequently subject to an unlimited amending power. See Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1054-58 (1951); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327, 1346 (1948). It is, true that the contract concept in its purity does not neatly attach to the relationship between a union and its members. But it is also true that the concept is a flexible one which in many fields (e.g. corporations and public utilities not to speak of "quasi contracts") is applied to non-negotiated and non-consensual arrangements. The technical limitations of the contract concept are thus less important than its usefulness in protecting reasonable expectancies or in restraining, through "public policy" limitations, "abuses" of power. For these purposes, the contract concept, applied in the light of distinctive relationships involved, appears to be as useful a tool for defining and shaping the mutual responsibilities of the union and its members as any other which is available.

[134] 346 U. S. 618-621.

[135] *Id.* at 632.

[136] *Id.* at 631. The dissent also urged that the provision for private remedies in §303 of the LMRA by implication excluded all other private remedies. This contention ignores the fact the §303 was defining new substantive liabilities in an area

where state law had often excluded any relief. The provision for private actions in such situations is a dubious basis for ousting state power to grant relief for established categories of liability, such as contract liability, in an area, such as union internal affairs, which is in general subject to state power.

[137] *Id.* at 632-633.

[138] The dissenters declared that state and federal courts had been unanimous in denying state power to award damages for employer discriminations (instigated by unions) against nonmembers. *Id.* at 628-629, citing cases in note 15; but see Selles v. Local 174 of Int'l. Brotherhood of Teamsters, 50 Wash. 2d 660, 314 P.2d 456 (1957), cert. denied, 356 U. S. 975 (1958); cf. Thorman v. International Alliance, 49 Cal. 2d 629, 320 P.2d 494 (1958).

[139] See §10(b) of the LMRA.

[140] In industries with a closed shop tradition, employers may be reluctant to hire or retain a person who is not a union member even though the union does not press for such job discrimination. Where the union expels a member, such employer reluctance may make proof of resulting job discrimination extremely difficult. It is true that covert forms of discrimination against employees whom unions have been forced to restore to membership are also possible, but the employee's possession of a union card would appear to increase somewhat the obstacles to the effective use of such tactics.

[141] Multiple litigation scarcely promotes the healthy continuing relationship between the union and its members, and it is doubtful that two actions will be particularly "curative."

[142] An employee, for example, expelled from a union for claiming the Fifth Amendment as to questions concerning alleged membership in the Communist Party may thereafter be discharged by his employer. Whether such a discharge violates the LMRA turns on a hairline distinction, viz., whether it was based on the employee's expulsion from the union rather than the employer's unwillingness to retain employees suspected of being communists. See Comment, 62 Yale L.J. 954, 964-65 (1953).

Whatever the result under the LMRA, expulsion under such circumstances, if not authorized by the union constitution, could be remedied by a state direction of restoration of membership and (preemption aside) by a damage award. Cf. Allen v. Office Employees Union, 329 P.2d 205 (Wash.Sup.Ct., 1958). It would seem unfortunate to bar a state court passing on the propriety of expulsion from also passing on the damage issue merely because of the possibility of a finding of an unfair labor practice by the NLRB.

[143] The present no-man's land resulting from the *Guss* case and the NLRB's jurisdictional policies (see text at note 175, *infra*) is, of course, another practical aspect of the remedial situation. *Guss*, coupled with a declination of jurisdiction by the Board, would deny the wronged member any compensatory relief if state power were ousted. This anomaly is a pervasive consequence of the no-man's land. But in an area so intimately connected with state competence over internal affairs, there are special make-weight reasons for obliquely shrinking the no-man's land by recognizing state power. Furthermore, the recognition of the implications of §14(b) and its legislative history would constitute an independent basis for *Gonzales*. But such an approach would require the overruling of *Plankington*. See text, supra, accompanying note 130-131.

[144] 350 U. S. 892 (1952), reversing, 223 Fed. 2d. 739 (5th Cir., 1955).

[145] Professor Cox has urged that bargaining by a union which violates its duty of fair representation should be held to be a violation of Section 8(b)(3) of the LMRA. See Cox, The Duty of Fair Representation, 2 Vill. L. Rev. 151, 172-175 (1952); see also Note 65, Harv. L. Rev. 490, 494, n. 46 (1952). Although recognizing the technical difficulties involved, Cox has not considered whether more vigorous enforcement by the Board of the duty of fair representation would interfere with its other functions. The problem results not merely from the great delays already involved in Board proceedings but also from the fact that the most flagrant and the most easily identifiable departures from fair representation involve racial discrimination. Vigorous intervention in this area by the Board might provoke budget-cutting by Congress; hostility from the Southern bloc might be intensified by the absence of clear statutory authority. This political factor is also passed over by Professor Wellington, who, moved by the Board's expertise, recommends a statute conferring on the Board responsibility for enforcing on the duty of fair representation. See Wellington, supra note 133, at 1357. But reliance on the "Board's expertise," which is easily and frequently exaggerated, may merely obscure the enormous difficulties involved in policing the duty of fair representation, except where flagrant racial discrimination is involved. Since more vigorous enforcement of that duty will probably be directed largely at racial discrimination, a judicial remedy may be preferable to an administrative remedy because the former remedy is dispersed and is less vulnerable to budgetary reprisals. Although the judicial remedy suffers from the absence of government-supplied counsel, private counsel may be available—at least in the area of racial discrimination—even though individual litigants may not be able or willing to pay the fees. Furthermore, since the basic problem in this area appears to be adequate preventive relief, the possible bias of juries in actions for damages may be put aside.

[146] See Rives, J., dissenting in 223 F. 2d 739, at 747 (5th Cir., 1955).

[147] In Farnsworth and Chambers Co. v. Local Union 429, 299 S.W. 2d 8 (Tenn. 1957), picketing to secure the employment of union members exclusively was enjoined as a violation of the Tennessee "right-to-work" law. The Supreme Court reversed *per curiam*. Local Union 429, Int. Broth. of Elec. Workers, 353 U. S. 969 (1957), citing Weber v. Anheuser-Busch, 348 U. S. 468 (1955) and Garner v. Teamsters Union, 346 U. S. 485 (1953). The underlying facts together with these citations suggest that the basis for the Court's decision was the overlap between the state injunction and the NLRB's remedy for violation of Section 8(b)(2) of the LMRA.

[148] See Douglas Aircraft v. IBEW, 41 LRRM 2594, 2598 (Sup. Ct. of N. C. 1958).

[149] See Cox, supra note 4, at 1324 et. seq.

[150] See supra, text following n. 68.

[151] 1 Harper and James, The Law of Torts 523-526 (1956).

[152] See e.g., Keith Theatre v. Vachon, 134 Me 392, 403, 187A692 (1936). The rationale for subsequent decisions reaching a similar result has naturally been affected by the pin-pointing of the issues involved by frequent litigation and by subsequent state and federal statutes. See generally 11 ALR2d 1338 (1950).

[153] See Cox, supra note 4, at 1324.

[154] Anheuser Busch v. Weber, 364 Mo. 573, 265 SW2d 325 (1954).

[155] 364 Mo. 573, 579, 265 SW2d 325, 328.

[156] See Cox, supra note 4, at 1330.

[157] See 364 Mo. at 579, 580, 582, 265 SW2d at 328, 329, 330,

[158] See United States v. Hutcheson, 312 U. S. 219 (1941).

[159] See text accompanying note 137, supra.

[160] See Cox, supra note 4, at 1331. The example is suggested by Allen-Bradley Co. v. Local Union No. 3, 325 U. S. 797

(1945) and Mayer Bros. Poultry Farm v. Meltzer, 274 App. Div. 169, 80 N. Y. S. 2d 874 (1st Dept. 1948), app. den. 83 N.Y.S. 2d 228, 274 App. Div. 877. In view of the possible overlap between state and federal anti-trust laws in the situations described in the text, it should be noted that national anti-trust legislation has generally not been viewed as preempting state regulation. See Standard Oil Co. v. Tennessee 217 U. S. 413, 421-22 (1910). Commonwealth v. McHugh, 326 Mass. 249, 264-267, 93 NE 2d 751, 762 (1950); Mayer Bros. Poultry Farm v. Meltzer, 274 App. Div. at 177. As to state anti-trust law applied to labor-management relations, this view merits reexamination because of the interlacing of federal labor statutes and the Sherman Act in the *Hutcheson* case (312 U. S. 219 (1941)), and the preemption of state power over labor relations.

[161] It is true that in the *Weber* situation the particular exclusionary arrangements would be lifted after the appropriate shift in the union status of the employees of the excluded enterprises. But such a shift might touch off new exclusionary pressures on the part of the rival union. Furthermore, in the case of exclusion based on location, exclusion presumably could also be ended by plant relocation which would bring the enterprise within the orbit of the union enforcing the exclusionary arrangements.

[162] A strike in both the *Weber* and the geographical boycott situation would appear to involve a violation of § 8(b)(4)(A) of the LMRA. If, however, performance of the contract at the time of its execution would not involve a termination of an existing relationship with a particular employer, such a violation might perhaps be avoided. Cf. International Association of Machinists 101 NLRB 346 (1952) and Chauffeurs, Teamsters, Warehouseman and Helpers Local Union, No. 135, 105 NLRB 740, 744, note 6 (1953), reserving the question of the legality of a strike for a hot-cargo clause. After these decisions the NLRB modified its general views as to hot-cargo contracts. See Local 1976, Carpenters v. NLRB, 42 LRRM 2243 (1958).

[163] Professor Cox, himself, recognized this possibility. See Cox, supra note 4 at 1331.

[164] See, e.g., *Laburnum*, discussed *supra*, in text accompanying note 81; *Gonzales*, discussed *supra*, in text accompanying and following note 88.

[165] See supra text at note 57.

[166] See supra text accompanying note 137.

[167] See supra text accompanying note 88.

[168] See for a collection of authorities, Kerrigan Iron Works, Inc. v. Cook Truck Lines, 296 S. W. 2d 379, 383-84 (Tenn. App. 1956).

[169] See, e.g., Teamsters, Chauffeurs and Helpers v. Kerrigan, 353 U. S. 968 (1957), reversing Kerrigan Iron Works, Inc. v. Cook Truck Lines, 296 S. W. 2d 379 (Tenn. App., 1956); cf. McCrary v. Aladdin Radio Industries, 355 U. S. 8 (1957). A comparison of the Court's apparent refusal to separate these issues in preemption cases with the I.C.C.'s approach is instructive. The I.C.C. declared that the validity of agreements between unions and carriers was a matter solely within the NLRB's competence. (At about the same time, two of the three members of the Board who declared hot-cargo clauses executed by common carriers invalid, justified this result by reference to the Interstate Commerce Act and the I.C.C. rulings thereunder. See Genuine Parts Co., 119 NLRB No. 53, 41 LRRM 1087, 1091-92 (1957).) The I.C.C., although deferring to the Board's expertise in labor matters, asserted its own jurisdiction over the conduct of common carriers in relation to their public obligations under the Interstate Commerce Act, without regard to terms included in their collective bargaining agreements. The Commission concluded that the carrier's refusal to provide service because of its hot-cargo clause violated the Interstate Commerce Act. See Be-Mac Transport Co. (I.C.C.), No. MC-C 1922, Dec. 6, 1957, 41 LRR 163. Since the concurrent jurisdiction of the states over common carriers has been recognized (see Meeker v. Lehigh Valley R. R., 236 U. S. 412 (1915)), it is difficult to see why the states, any more than the I.C.C., should be disabled from enforcing their general policy against a carrier merely because of the carrier's involvement in a labor dispute.

[170] See 296 S.W. 2d at 382.

[171] Only a brief reference to the complex argument involved is possible here. Where the employees of a secondary employer (here, the carrier) refuse to cross a picket line adjacent to a primary employer (here the shipper or consignee) or refuse to handle or process the primary employer's goods, the employees' refusal is, unless sanctioned by a contract, unprotected, i.e., the carrier could lawfully discharge them. See Snow Auto Parts, 107 NLRB 242 (1953); cf. NLRB v. Rockaway News Supply Company, 345 U. S. 17 (1953). In the common carrier context, the validity of such a contract is uncertain. See Local 1976, Carpenters v. NLRB, 357 U. S. 93, 108 (1958). The intersection of labor and transportation policy complicates the issue of what federal tribunal has jurisdiction to pass on the issue of validity. See note 169, infra. Insofar as the states are concerned, their jurisdiction to enforce the carrier's duty to serve without discrimination was confirmed, prior to the enactment of the LMRA. See Meeker v. Lehigh R. R., 263 U. S. 412 (1915). Insofar as relations between the carrier and its customers are concerned, state competence would appear to extend to the validity or effect of a hot-cargo clause. Even if *Lincoln Mills* (353 U. S. 448 (1957), discussed in text at note 208, infra) has displaced state law, state competence to apply federal law to collective bargaining agreement may be upheld.

Where, however, a state attempts to regulate employee activity on the ground that it defeats the state transporation policy, the possibility of overlap with federal remedies or encroachment on federally protected activities exists. Nevertheless, in this context, whether the employee conduct is protected depends on the validity of the hot-cargo clause—and that issue could be characterized as dominantly one of transportation policy although labor policy is also "incidentally" involved. The crucial bearing of transportation policy on the issue might justify reliance on *Briggs-Stratton* (discussed, supra, at note 34) as authority for state determination of whether the employees' refusal to serve was federally protected. A negative determination would be the basis for state competence to enjoin employee interference with the carrier's discharge of its duty to serve, i.e., an injunction requiring the employees to cross the picket line. Whether state power should be exercised in a given situation and the possible impact of the Norris La-Guardia Act are, of course, separate questions.

A final complication results from the puzzling proviso of §8 (b)(4) of the LMRA, which provides that "*nothing contained in this subsection (b)* shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer) if the employees are engaged in a strike ratified . . . by a representative of the employees of the strike-bound employer." (Emphasis supplied.)

This complex provision cannot be fully treated here. It is worth noting, however, that the underscored language implies that there may be other sources of restraint against respect

for picket lines other than those embodied in §8(b)(4). Furthermore, although the prohibition against involuntary servitude might bar judicial compulsion to force employees to cross picket lines, that prohibition would not preclude judicial restraint of actions by unions to bring about a boycott by the employees of common carriers. The problems involved in commanding employees of common carriers to serve without discrimination resemble, it may be noted, those involved in compelling employees to serve others without regard to their race or creed.

This footnote is not offered as a solution of the problems involved but only as a suggestion that they do not seem appropriate for *per curiam* disposition.

[172] See Local 1976, Carpenters v. NLRB, 357 U. S. 93, 110-111.

[173] See cases cited in note 64, supra.

[174] Cf. Hill v. Florida, discussed supra at text accompanying note 28.

[175] 353 U. S. 1 (1957); two companion cases were also controlled by the *Guss* decision: Amalgamated Meat Cutters v. Fairlawn, *id.* at 20; San Diego Unions v. Garmon, *id.* at 26.

[176] The alternatives to the *Guss* result have been the subject of exhaustive discussion, which will not be recapitulated or appraised here. See generally, Tobriner and Grodin, Taft-Hartley Pre-emption in the Area of NLRB Inaction, 44 Cal. L. Rev. 663 (1956), citing many other discussions prior to *Guss*.

[177] See, e.g., §8(b)(4)A, proscribing union pressure to force an employer or self-employed person to join a union. This problem typically arises in connection with small businesses.

[178] For example, the late Senator Taft declared during the legislative debate:

> I myself feel that the larger employers can well look after themselves, but throughout the United States there are hundreds of thousands of smaller employers, smaller businessmen, who, under the existing statutes, have come gradually to be at the mercy of labor union leaders, either labor-union leaders attempting to organize their employees, or labor-union leaders interfering with the conduct of their business for one reason or another. 2 Legis Hist. 1005 (Congressional Record, Senate —April 23, 1947).

[179] In *Guss*, the Court appeared to invite legislation changing its decision, See 353 U. S. at 11. Legislative efforts have failed in part because they have become enmeshed with larger differences concerning the content of a desirable national labor policy.

[180] See The Discretionary Jurisdiction of the NLRB, 71 Harv. L. Rev. 527, 532-34 (1958).

The Court was careful to point out in *Guss* that it was not passing on the validity of the Board's declining jurisdiction on an ad hoc basis or on the basis of its general yardsticks. The general standards based on dollar minima might be invalidated without necessarily outlawing the ad hoc declinations of jurisdiction. See 71 Harv. L. Rev. at 532-34. The Board's practice of ad hoc declination was established under the Wagner Act and was not disturbed by Taft-Hartley. Although an ad hoc policy would theoretically permit the Board to consider the seriousness of the abuse involved in a particular case, the Board's case load might make this possibility largely academic. Such a policy would avoid public announcement of the fact that a federal statute could be violated with impunity. See (ex-Board-Chairman) Madden, Comment and Appraisal, 16 Ohio St. L. Rev. 427, 432 (1955), objecting that prior announcement of jurisdictional standards "lets the cat out of the bag." But the ad hoc policy would revive the uncertainties and the dubious use of staff which the jurisdictional standards were designed to eliminate.

[181] See, e.g., Johnson v. Building Trades Council, 42 LRRM 2680 (Circ. Ct. Ottowa County, Mich., 1958), where the exercise of state power was rationalized as necessary to avoid a violation of due process. But, this approach is inconsistent with the Supreme Court's disposition of *Guss* and of *Fairlawn*. See Ex Parte Twedell 309 S.W. 2d 834 (Sup. Ct. Texas 1958); Heiser Ready Mix v. Int. Broth. of Teamsters, Wisc. Emp. Rel. Bd. Case I No. 6552 Cir. 244, Dec. No. 1780 (mimeo 1, p. 21, June 2, 1958). The due process argument might lead the federal courts to direct the NLRB to exercise its jurisdiction fully. See Heiser Ready Mix Co. v. Fenton, 42 LRRM 2735 (U.S.D.C., N.D. Wis., July 9, 1958) directing Board's General Counsel to investigate charges of unfair labor practices even though the Board's jurisdictional yardsticks are not satisfied. Cf. Hourihan v. NLRB, 201 F2d 187 (D.C. Cir. 1952) cert. denied, 345 U. S. 930 (1953); Pederson v. NLRB, 234 F2d 417 (2d Cir. 1956); Office Employees v. NLRB, 353 U. S. 313 (1957).

[182] The Board, explaining its action as a result of the *Guss* decision, announced proposed changes in its jurisdictional standards. See NLRB Statement, R-570, issued July 22, 1958, 42 LRR 363 (July 22, 1958). According to Chairman Leedom's testimony before a House sub-committee on June 10, 1958, the new standards would include 20% of the cases now rejected. Ibid. See also note 183 infra. The proposed changes, with further changes expanding the Board's effective jurisdiction, were put into effect on October 2, 1958. See 42 LRR 633 (1958).

[183] For a comprehensive discussion of some of these problems, see The Discretionary Jurisdiction of the NLRB, 71 Harv. 527 (1958).

[184] Congress increased the NLRB's appropriations by more than 3 million dollars than the administration's request. The increase is designed to permit loosening of the Board's jurisdictional yardsticks and to cut down its backlog of cases. See 42 LRR 368.

[185] After this paper was prepared NLRB Member Rodgers pointed to the Board's backlog of 4,650 undisposed of cases, under the 1954 standards and expressed similar fears that an expansion of its jurisdiction would congest the bottleneck at the top. See 42 LRR 492, 498 (1958).

[186] The size of the Board might be increased, with one panel entrusted with representation cases and the other with unfair labor practice cases. The interrelationships between the two types of cases and especially between unit determinations and duty to bargain cases, is an argument against such a division, but the difficulties involved are not surmountable.

[187] See, e.g., the requirement of a hearing prior to an election, embodied in Section 9(c). Where a representation case does not involve an issue as to commerce or the appropriate unit, or bars to proceeding, insistence by a party on an election is often a wholly dilatory tactic. Such tactics might be avoided, without undue curtailment of private rights, by reverting to the Wagner Act practice of affording only a post election hearing in no-issue cases.

[188] See NLRB v. Denver Bldg. Council, 341 U. S. 675, 684 (1951).

[189] Frankfurter, J., in Polish Alliance v. NLRB 322 U. S. 643, 648 (1944).

[190] Ibid. Cf. however, the argument recently made by the Board's General Counsel:

> "Finally, the Supreme Court has ruled that the federal power over commerce—which is co-extensive with the

coverage of the National Act—reaches the wheat grown by a single farmer for his own consumption (*Wickard v. Filburn*, 317 U. S. 111), and a retail druggist who removes 12 tablets from their out-of-state container and places them in his own box for local sale. *U. S. v. Sullivan*, 332 U. S. 690, 697, 698." 110.

NLRB brief, p. 11, in NLRB v. N. Y. SLRB, 99 F. Supp. 526, quoted in Feldblum, Jurisdictional "Tidelands" in Labor Relations, 3 Lab. L. J. 115, 117 (1952).

[191] See cases cited in note 175, supra, for illustrations of enterprises, including retailers which were not "large" but were large enough to "affect commerce." See also, Howell Chev. Co. v. NLRB 346 U. S. 482 (1953) sustaining applicability of LMRA to Chevrolet dealer franchised by General Motors, purchasing $1,000,000 annually from G. M. 43% of which was manufactured out of state. Douglas J., dissented without opinion.

[192] In Textile Workers v. Lincoln Mills, 353 U. S. 448, 452 (1957) the Court found the legislative history inconclusive. Commentators have differed on the meaning of that history as well as on the wisdom of the decision in *Lincoln Mills*. Cf., e.g., Bickel and Wellington, Legislative Purposes and the Judicial Process. The Lincoln Mills Case, 71 Harv. L. Rev. 1 (1957) with Feinsinger, Enforcement of Labor Agreements —A New Era in Collective Bargaining, 43 Va. L. Rev. 1261, esp. at 1270-71 (1957), and Bunn, Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements, Id. at 1247. Although the disagreement within and outside of the Court cautions against dogmatism, the extracts from the legislative history set forth in the opinion of Frankfurter, J., dissenting in *Lincoln Mills*, p. 485 et. seq., esp. pp. 530, 540-44 are, in my opinion persuasive evidence in support of a dominantly jurisdictional interpretation of § 301.

[193] See Unions as Juridical Persons, 66 Yale L. J. 712, 714 (1957).

[194] § 301(b) provided "Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." It is, of course, arguable that both the provisions conferring a judicial status on unions and those dealing with the enforceability of judgments are "substantive."

[195] Section 2 of Article III provides in part: "The judicial power [of the United States] shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States—— . . . to Controversies . . . between Citizens of different states."

[196] 304 U. S. 64 (1938).

[197] 47 Stat. 70, 29 U.S.C.A. Sec. 101 et. seq. (1932).

[198] The Conference Report, in explaining the deletion of a provision which would have made the failure to abide by an arbitration agreement an unfair labor practice, stated: "Once parties have made a collective bargaining contract, the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." H.R. Conf. Rep. No. 510, 80th Cong. 1st Sess., p. 42, quoted 353 U. S. 448, 452. See also references to Mr. Justice Frankfurter's dissent in *Lincoln Mills*, cited in note 192, *supra*.

[199] The only one of the problems enumerated in the text, which was raised during the legislative history was the constitutionality of a grant of jurisdiction to federal courts to enforce state law in non-diversity actions. For references to the legislative history, see 353 U. S. 485, 533, 541-42.

[200] 348 U. S. 437 (1955).

[201] Mr. Chief Justice Warren wrote an opinion concurred in by Clark, J.; Reed, J., concurred separately.

[202] See also Rule 17(a) of the Federal Rules of Civil Procedure discussed in Bunn, op. cit. note 183, at 1258.

[203] Mr. Justice Frankfurter forcefully developed these two considerations (see 348 U. S. at 456-59) but disregarded them in order to avoid constitutional questions.

[204] See the provisos to §9(a) of the LMRA.

[205] For a discussion of the individual's right to bring an action under a collective bargaining agreement, see Cox, Individual Enforcement of Collective Bargaining Agreements, 8 Lab. Law Journ. 850 (1957).

[206] When the Court reaches these questions, it may well reverse *Westinghouse*. Cf. Rep. of Committee on Labor Arbitration of Labor Relations Section of American Bar Assn. (1956), 28 LA 913, 917. The underlying labor-management disputes in *Westinghouse* and *Lincoln Mills* (as well as its two companion cases) were basically the same in that each involved monetary claims of individual employees. See Bunn, supra note 183, at 1248 et. seq. Given the elimination of the constitutional questions raised by Section 301, there is no apparent justification for recognizing federal-question jurisdiction under § 301 to enforce union demands for arbitration of disputes concerning the individual rights of employees while denying such jurisdiction over direct enforcement of such rights. On the contrary, such disparate treatment would be anomalous. It would, e.g., imply a denial of jurisdiction under § 301, to enforce arbitration awards even though such awards resulted from the previous enforcement, under § 301, of agreements to arbitrate. This result is implied because an award which provides for money payments to employees defines their individual rights to the same extent as the provisions involved in *Westinghouse*. Neither § 301 or a coherent policy of labor relations or of judicial administration warrants such a truncated allocation of federal judicial power.

Adherence to *Westinghouse* may also produce difficulties in state, as well as federal diversity, actions involving individual rights of employees. In such actions, courts will be confronted with the question of whether state or federal substantive law governs. See text accompanying note 223 infra and Bridges v. F. H. McGraw and Co., 302 S.W. 2d 109 (Ky. 1957), holding that state substantive law controls. Such an approach, however, could produce inconsistent interpretations of the same agreement under federal and state law, respectively, and thus threaten the uniformity which was apparently the basic objective of the Court's ouster of state law in *Lincoln Mills*. For a fuller discussion of the problems involved, see 71 Harv. L. Rev. 1169 (1958), noting the *Bridges* case.

[207] 353 U. S. 448 (1957).

[208] See Bickel and Wellington, op. cit., supra, n. 183.

[209] Goodall-Sanford, Inc. v. United Textile Workers, 353 U. S. 550 (1957); General Elec. Co. v. Local 205, United Elec. Workers, *id.* at 547.

[210] 9 U.S.C., Sections 1-14 (1952).

[211] 353 U. S. at 452.

[212] *Id.* at 455.

[213] *Ibid.*

[214] *Id.* at 451.

[215] But *cf. General Electric Co.* v. *Local 205*, 353 U. S. 547,

548 where the Court stated: "We follow in part a different path than the Court of Appeals, though we reach the same result." Since the Court of Appeals for the First Circuit (233 F2d 85, 87 et. seq. (1956) had relied on the Arbitration Act, the Court's language reenforces the rejection of the applicability of that Act implied by the failure to invoke it in *Lincoln Mills*. Cf. Frankfurter, J., dissenting, 353 U. S. at 466. In Boston Printing Pressmen Union No. 67 v. Potter Press, 241 F.2d 787 (1st Cir. 1957), cert. denied, 355 U. S. 817 (1957), Section 301 was held not to authorize specific enforcement of an agreement to submit to arbitration issues as to the terms to be included in a new contract, principally on the ground that such enforcement is not authorized by the United States Arbitration Act. The Supreme Court's failure to rely on that Act in *Lincoln Mills* would appear to eliminate that ground for distinguishing, in actions for specific enforcement, between clauses providing, respectively for "grievance" and "economic" arbitration. That distinction, which is not warranted by the language of Section 301, has properly been questioned. See 70 Harv. L. Rev. 365 (1956), 52 N.W. L. Rev. 284, 288, 294 (1957); but cf. 105 U. Pa. L. Rev. 269 (1956). Cf. also with *Potter Press*, St. Ry. Employees v. Pittsburgh Rys., 30 L.A. 477 (Pa. Sup. Ct., W. Dist., 1958) cert. denied, Nov. 10, 1958, 43 L.R.R. 53 [enforcing under Pennsylvania Arbitration Act on agreement to arbitrate amendments of contract provisions for a retirement plan].

[216] See especially, Section 7, 47 Stat. 71 29 U.S.C.A. § 107.

[217] 353 U. S. at 458.

[218] See also § 203(d) of the LMRA, which also endorses the use of arbitration for the settlement of grievance disputes.

[219] 353 U. S. at 458.

[220] *Id.* at 460.

[221] That concept has been invoked to sustain the jurisdiction of federal courts to apply state law in actions involving federally created instrumentalities. See Frankfurter, J., dissenting, 353 U. S. at 473, et. seq. Such jurisdiction has been defended in the context of labor relations on the ground that it is necessary for the protection of an extensive body of federal labor regulation. See Mendelsohn, Enforceability of Arbitration Agreements under Taft-Hartley Section 301, 66 Yale L. J. 167, 191 (1956). Senator Taft during the hearings on the proposed legislation defended federal jurisdiction on grounds quite similar to this protective jurisdiction concept although he did not invoke it by that name. See Hearings before Committee on Labor and Public Welfare, on S. 55 and S. J. Res. 22, 80th Cong., 1st Sess., pp. 56-58, quoted in the dissent of Frankfurter, J., 353 U. S. 524-29, esp. p. 526.

[222] See references cited in note 203, supra.

[223] Actions to enforce collective bargaining agreements brought in state courts are not strictly "Section 301 actions"; they are actions brought under state jurisdictional authorizations and not pursuant to Section 301. "Section 301 actions" will, however, be used here to include actions which could have been filed in a federal court pursuant to Section 301 even though they are filed in a state court.

[224] 353 U. S. at 456-57.

[225] See McCarrol v. Los Angeles County Dist. Counc. of Car. 49 Cal. 245, 315 P2d 322 (1957), discussed infra in text accompanying note 235.

[226] It has been suggested that in state actions state law will govern "collateral questions of substantive law," such as the general law of contract and general defenses, such as fraud, etc. See Pirsig, The Minnesota Uniform Arbitration Act and the Lincoln Mills Case, 42 Minn. L. Rev. 333, 374 (1958). Although determination of collateral questions on the basis of state law is a familiar incident of federal-question jurisdiction, the general law of contract and general defenses have so crucial an impact on the existence of a "federal right" under a collective bargaining agreement, that it is doubtful that such matters will be controlled by state law.

[227] See, e.g., Mendelsohn, supra note 221, at p. 189.

[228] See, Note, 57 Col. L. Rev. 1123, 1132-34 (1957), for a useful discussion of the competing considerations.

[229] After *Lincoln Mills*, the California Supreme Court held that Section 301 did not foreclose state jurisdiction. McCarroll v. Los Angeles County Dist. of Car., 49 Col. 2d 45, 315 P. 2d 322 (1957), Carter, J., dissenting on other grounds. Accord: Garment Manufacturers Ass'n. v. Garment Workers, County 41 LRRM 2536 (Pa. Com. Pleas, Schuylkill County, 1957). For pre-*Lincoln Mills* decisions to the same effect, see, e.g., General Elec. Co. v. UAW-CIO, 93 Ohio App. 139, 108 N.E. 2d 211 (1952), appeal dismissed, 158 Ohio St. 555, 110 N.E. 2d 424 (1953); General Bldg. Contractors' Ass'n. v. Local 542, 370 Pa. 73, 87A. 2d 250, 32 ALR 2d 822 (1952).

[230] Since such machinery would appear to be "procedural," the answer would seem to be clearly "yes." But the use of such machinery would presumably be governed by "federal law" concerning arbitrability or the arbitrator's jurisdiction, the basis for attacking an award, the requirements of fair procedure in arbitration. Such matters go to the heart of the federally-recognized right to enforcement of arbitration provisions and would accordingly appear to be matters of "substance" controlled by federal standards.

[231] See 353 U. S. at 465.

[232] Cf. Hart and Wechsler, The Federal Courts and the Federal System, 628-30 (1953).

[233] See, e.g., United States v. Hutcheson, 312 U. S. 219 (1945); Allen-Bradley Co. v. Local No. 3, Int. Bhd. of Electrical Workers, 325 U. S. 797 (1939). The problem of accommodating Section 301 and the Norris-LaGuardia Act will be especially acute. See text, *infra*, accompanying note 245 et. seq.

[234] § 301 makes it clear that the union may sue and be sued as an entity, that unions and employers are to be responsible for the acts of their "agents," without, however, clarifying elastic standards of vicarious responsibility, and that a collective bargaining agreement imposes legally enforceable duties whose breach is to be remedied by suits for damages.

In addition other provisions of the LMRA will bear on the basic validity of the agreement involved or of particular clauses such as those embodying union-security arrangements.

[235] 49 Cal. 2d 45, 315 P. 2d 332 (1957), noted in 58 Col. L. Rev. 278 (1958).

[236] This position was recently adopted in A. H. Bull S. S. Co. v. Seafarer's Union, 250 F. 2d 236 (2d Cir., 1957) reversing 155 F. Supp. 739 (E. D. N. Y., 1957), cert. denied 355 U. S. 932 (1958). All of the opinions in United States v. United Mine Workers 330 U. S. 258 (1947) (decided prior to Taft-Hartley) assumed that the Act generally barred an injunction against the breach of a no-strike clause.

[237] See 71 Harv. L. Rev. 1172, 1175 (1958); 25 Univ. of Chi. L. Rev. 496 (1958).

[238] See 353 U. S. at 464.

[239] United States v. Hutcheson, 312 U. S. 219 (1945).

[240] In damage actions, the practical importance of the question is reduced by the plaintiff's right to sue in a federal court and by the defendant's power to remove state actions. 28 U.S.C.S. 1441 (a) (1952) provides that "any civil action brought in a state court of which the federal district courts . . . have original jurisdiction, may be removed by the defend-

ant . . . to the district court of the United States." But in injunction actions, the defendant's attempt to remove may be blocked by the argument that the action is not removable since the Norris-La Guardia Act has deprived the federal courts of "jurisdiction" to enjoin strikes. See 28 U.S.C.S. 1441(a) quoted *supra*. Some federal courts have taken this position. See Fay v. American Cytoscope Makers Inc., 98 F. Supp. 278, 280 (S. D. N. Y., 1951). Parsons v. Sinclair Refining Corp., 18 Lab. Cas. (CCH) Par. 65, 705 (E. D. Okl. Civ. No. 2709, March 14, 1950). Contra, Miller Parlor Furniture Co. v. Furniture Worker's Industrial Union, 8 F. Supp. 209 (D. N. J., 1934). See generally 20 Univ. of Chi. L. Rev. 304 (1953).

[241] 350 U. S. 198 (1956).

[242] 304 U. S. 64 (1938).

[243] 326 U. S. 99 (1945).

[244] It is not clear whether states which *deny* injunctive relief under "baby" Norris-LaGuardia Acts could be compelled to *grant* such relief in Section 301 cases if it were available in the federal courts. See Hart, The Relations Between State and Federal Law, 54 Col. L. Rev. 489, 507 (1934); 71 Harv. L. Rev. 1172, 1174 (1958). If the availability of such relief in federal courts were clearly established, the practical significance of this question would be reduced as the result of the plaintiff's privilege to sue in a federal court.

[245] See 315 P. 2d at pp. 331-32.

[246] See *Lincoln Mills,* 353 U. S. at 454-55.

[247] *Id.* at 452. Senator Taft indicated that § 301 would not displace state equitable remedies. See extracts from legislative history appended to opinion of Frankfurter, J., dissenting in *Lincoln Mills, id.* at 493.

[248] For a discussion of conflicting state cases, see Rice, A Paradox of Our National Labor Laws, 34 Marq. L. Rev. 233, 242 et. seq. (1951); and Note 37 Va. L. Rev. 739, 744 et. seq. (1951).

[249] See 315 P. 2d at p. 332.

[250] See, e.g., Beacon Piece Dyeing and Finishing Co., 121 NLRB No. 113, 42 LRRM 1491 (1958); Inland Steel Co. 77 NLRB1, 14 (1948), enforced, 170 F2d 247 (7th Cir., 1948), cert. denied 336 U. S. 960 (1949); General Motors Corp. 81 NLRB 779 (1949), enforced, 179 F2d (2nd Cir., 1950).

[251] For an illustration of the overlap between questions as to the content of the bargain and questions concerning violations of the duty to bargain, see Unit. Elec. Workers v. General Elec. Co. 231 F2d 259 (D.C. Cir. 1956), cert. denied 352 U. S. 872 (1957), discussed in Dunau, Contractual Prohibitions of Unfair Labor Practices: Jurisdictional Problems, 57 Col. L. Rev. 52, 57, 78 (1957).

[252] The most important exception involves disputes as to breach of no-strike clauses. For a collection of cases on the arbitrability of such disputes, which is affected by the breadth of the arbitration clause, see McCarroll v. Los Angeles County Dist. Coun. of Car., 315 P2d 322, 334, note 1 (Cal. 1957).

[253] See note 218 supra.

[254] The Court in another context has recognized that, in enforcing the duty to bargain, consideration should be given "to the philosophy of collective bargaining as worked out in the labor movement of the United States." NLRB v. American Nat'l. Ins. Co., 343 U. S. 395, 408 (1952). Recognition of that "philosophy," including the widespread reliance on arbitration in resolving issues of contract administration, would be equally appropriate in adjusting judicial and administrative jurisdiction.

[255] See, e.g., Textile Workers Union of America v. Arista Mills Co., 193 F2d 529, 533 (4th Cir., 1951). But cf. Ind. Petrol Workers of N. J. v. Esso Standard Oil Co. 235 F2d 401 (3rd Circ. 1956).

[256] For illustrative cases affirming judicial competence notwithstanding an overlap between contractual and statutory prohibitions, see Machinist's Assn. v. Cameron Iron Works, 257 F.2d 465 (5th, 1958), cert. den. 42 LRR 310 (1958) [specifically enforcing arbitration clause]; United Elec. Workers v. Worthington Corp. 236 F2d 364 (1st Cir., 1956), reversing 136 F. Supp. 31 (E. D. Mass., 1955) [and enforcing arbitration award]; Ind. Petrol Workers of N. J. v. Esso Standard Oil Co., 235 F2d 401 (3rd Cir. 1956). Contra: United Ass'n. of Journeymen, etc. v. Marchese, 81 Ariz. 162, 302 P2d 930 (1956) (2 justices dissenting). See also United Electrical Workers v. General Elec. Co., 231 F2d (App. D. C., 1956) denying jurisdiction where union's complaint for injunctive relief alleged that employer's unilateral adoption of new discharge rule constituted a violation of both the agreement and the duty to bargain. Although the *General Electric* case was "distinguished" in the *Worthington* case (see 236 Fed. 2d at 370) the only basis for distinction would appear to be the fact that the plaintiff's complaint in *General Electric* explicity charged an unfair labor practice whereas the charge was merely implied in *Worthington*. This essentially formal difference appears to be a dubious basis for disparate results as to the existence of Section 301 jurisdiction even though the Supreme Court in *Weber* attached significance to the fact that the moving party had alleged a federal unfair labor practice. See 348 U. S. 468, 481 (1955). Whatever weight should be attached to the form of the complaint in other contexts, that factor scarcely seems entitled to significant, let alone, decisive, weight in the context of Section 301. That section recognizes judicial competence to deal with contract violations; such violations are separable from violations of the LMRA. Under such circumstances, the adjustment between judicial and administrative competence should be based on more substantial considerations than the form of the pleadings. See the *Worthington* case, 236 F2d 364, 370, citing cases where courts in dealing with conduct which simultaneously could constitute a contractual and statutory violation have separated the issues and have exercised jurisdiction over the contractual issues.

For extensive discussions of cases dealing with jurisdiction in the overlap context, see Dunau, supra, note 250; Note, 69 Harv. L. Rev. 725 (1956).

[257] Cf. Mendelsohn, supra note 221, at 186 with Dunau, supra note 251.

[258] See, e.g., McCarrol v. Los Angeles County Dist. Coun. of Car. 49 Cal. 2d 45 at 52-3, 315 P2d 322, at 325 (1957). In *McCarrol,* the court in order to maintain jurisdiction of an action for breach of a no-strike clause avoided the problem raised by overlap by concluding that the union's conduct, although it might reasonably have been considered a unilateral repudiation of a term of the contract, could not reasonably be deemed to be a violation of Section 8b(3) of the LMRA. This conclusion is, however, extremely doubtful. See note 239 supra.

[259] Illustrative cases are cited in note 255, supra.

[260] The pertinent difficulties are illustrated by the differences between the Board and the reviewing courts with respect to union-sponsored strikes after union grievances have been denied by an arbitrator or prior to arbitration of such grievances. In *Westmoreland Coal Company,* (117 NLRB 1072 (1957), the Board found a violation of Seciton 8(b)(3) of the LMRA when a union whose grievance was denied by an arbitrator

struck without complying with the notice and other requirements prescribed by Section 8(d). Its decision was, however, reversed. Local 9735, U.M.W. v. NLRB, 42 LRRM 2320 (Ct. of App. D. C., 1958), one judge dissenting. The reversal seems appropriate because the master contract left the issue involved to collective bargaining at the individual mines. Accordingly, the arbitration award held only that in the absence of a newly bargained standard the employer was free to take the action involved; it did not define the standard to be controlling during the term of the contract. Since that standard was left open by the parties, the union was privileged to strike to secure the standard which it preferred. Cf. NLRB v. Jacobs Mfg. Co. 196 F.2d 680 (2nd Cir. 1952).

In *Boone County*, 117 NLRB 1095 (1957), the Board held that a union had violated Section 8(b)(3) of the LMRA when it struck over grievances cognizable under the contractually prescribed grievance–arbitration procedure, without resorting to that procedure. Again, its decision was reversed, on the ground that the explicit rejection of a no-strike obligation in the contract made the provisions for grievance adjustment "a gentleman's agreement." See UMW v. NLRB, 42 LRRM 2264 (Ct. App., D. C., 1958) (one judge dissenting). But cf. Int. Broth. etc. v. W. L. Mead, 230 F2d 576 (1st Cir., 1956). The Board's intervention in such cases may be criticized as involving it in questions of contract administration which are beyond its responsibilities. See Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1438 (1958). But the Board's assumption of this responsibility seems at least as justifiable as its assumption of similar responsibilities, e.g., over unilateral change or repudiation, (see note 250, supra) which involve it in policing the bargain under the guise of policing the bargaining process. The grievance and arbitration procedure, even though the obligation to use it is voluntarily assumed, is an integral and a usual part of the bargaining process. Cf. Timken Roller Bearing v. NLRB, 161 F2d 949 (5th cir. 1947). Accordingly, the Board's conclusion that respect for such obligations must be enforced to protect the integrity of the bargaining process is justifiable.

What is of primary interest here is not the merits of that conclusion but the difficulty of forecasting the action of the Board and of the reviewing courts in situations involving a possible overlap. If in a particular situation the courts withheld relief under the contract because of a claim of overlapping remedies, the practical result might be a denial of a judicial remedy because of an unfounded assumption that a Board remedy would be forthcoming. To avoid such results, contractual jurisdiction should be exercised without regard to overlap.

[261] Discussed supra in text accompanying note 50.

[262] See United Ass'n. of Journeymen, etc. v. Marchese, 81 Ariz. 162, 302 P2d 930 (1956). See also United Electrical Workers v. General Elec. Co., 231 F2d 259 (App. D. C. 1956).

[263] See Dunau, supra note 250, at p. 53-54 for an able and extensive discussion of the differences between *Garner* and overlap in the context of Section 301.

[264] See cases cited in note 122, supra.

[265] See text accompanying note 134, supra.

[266] See Consolidated Aircraft Co., 47 NLRB 694, (1943). The Board declared (at pp. 705-06): "We are of the opinion that it will not effectuate the statutory policy of encouraging the practice and procedure of collective bargaining for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices within the meaning of the Act. On the contrary, we believe that parties to collective contracts would thereby be encouraged to abandon their efforts to dispose of disputes under the contracts through collective bargaining or through the settlement procedures mutually agreed upon by them, and to remit the interpretation and administration of their contracts to the Board. We, therefore, do not deem it wise to exercise our jurisdiction in such a case, where the parties have not exhausted their rights and remedies under the contract as to which the dispute has arisen." The Board's approach was approved and extended in the enforcement proceeding. 141 F. 2d 785, 788 (9th Cir., 1944). See generally, address by Board Member Jenkins, entitled "The Peacemakers," before Arbitration and Industrial Relations Conference, Fort Worth, Texas, November 19, 1957, p. 10 et seq. (Mimeo. available from Public Information Division of NLRB.)

[267] Spielberg Mfg. Co., 112 NLRB 1080 (1955); New Britain Machine Tool Co., 116 NLRB 645 (1956), reversed and remanded, on the ground that the Board had misconceived the statutory standards, in Int'l. Ass'n. of Machinists, AFL-CIO v. NLRB, 247 F2d 414 (2d Cir., 1957).

[268] See Shulman, Reason Contract and the Law, 68 Harv. L. Rev. 999, 1024, quoted by Frankfurter, J., dissenting in *Lincoln Mills*, 353 U. S. at 463.

[269] See McManis v. Panhandle Eastern Pipe Line, 273 S.W. 2d 789 (Mo. App., 1954).

[270] 350 U. S. 270 (1956). Mr. Justice Frankfurter, with whom Mr. Justice Minton and Harlan concurred, dissented on the ground that the strike, although a response to employer unfair labor practices, was subject to the waiting period and other requirements prescribed by §8(d) of the LMRA and that that section precluded reinstatement of the striking employees.

[271] This procedure is recommended in note 66 Yale L.J. 291 note 40. A general discussion of "primary jurisdiction" will not be undertaken here. For a thoughtful treatment, see Jaffe, Primary Jurisdiction Reconsidered: The Antitrust Laws, 102 Univ. of Pa. L. Rev. 577 (1954).

[272] Thus it may be urged that a strike provoked by unfair labor practices is "protected activity" and that a court's mistaken failure to hold that the employer had engaged in such practices would result in its granting damages or injunctive relief for conduct sanctioned by the national statute. In this connection, it is significant, however, that the protected or unprotected status of the conduct involved flows from an interpretation of the contract and that such interpretation is not controlled by a doctrine that all strikes in response to employer unfair labor practises are necessarily protected.

It is true that the Court in *Mastro Plastics* obliquely questioned the validity of a clause barring unfair labor practice strikes during the term of the contract. See 350 U. S. at 283. But the difficulties of distinguishing between unfair labor practice strikes and economic strikes and the availability of the Board's machinery for the correction of unfair labor practices would appear to be ample grounds for sustaining the parties' agreement to forego all use of economic pressure during the contract term. The validation of such a broad no-strike clause would make clear that the basic issue before the courts would be the interpretation of the contract rather than of the Board's doctrines as to protected activity.

[273] Thus the parties might attempt to invite Board determinations concerning rights under their agreement by embodying statutory standards therein. A no-strike clause might, e.g., expressly negate its applicability to strikes provoked by antecedent employer unfair labor practices. Such a clause would appear to make liability under the no-strike clause dependent on whether the employer's conduct had violated the statutory provisions

defining unfair labor practices. And it is arguable that such a determination should be made by the NLRB rather than by the courts, at least in situations where the Board's jurisdictional standards, the LRMA's statute of limitations, and other requirements for the use of the Board's machinery (see §9 f-h) could be satisfied. Nevertheless, the parties' incorporation of statutory standards in their agreement would not change the fact that the basic issue is one of the construction and application of the contract. And if the LMRA is read as remitting such questions to the courts, it is doubtful that the parties' agreement should be permitted to change the legislative allocation of authority.

[274] See the dictum in Int. Bhd. of Teamsters v. W. L. Mead, 230 F2d 576, 581-82 (1st Cir., 1956), cert. denied 352 U. S. 802 (1956). But cf. Ferguson Steere Motor Co. v. Int. Bhd. of Teamsters, 223 F2d 842 (5th Cir., 1955) holding that federal district courts lack jurisdiction to grant a declaratory judgment that a contract had been renewed by its terms. The grounds for decision were (1) jurisdiction was barred by *Westinghouse* and (2) the issue involved was peculiarly within the Board's jurisdiction under §8(d) of the LMRA, which, together with §301 had been invoked as a source of jurisdiciton by the plaintiff. *Westinghouse* seems a dubious basis for denying jurisdiction where the issue is the existence of a contract rather than the union's capacity to enforce "personal" provisions thereof. The second ground for the decision is equally dubious in that it ignores the fact that the issue of whether a contract was renewed by its own terms is separable from the unfair labor practice issue which may be raised by a union's non-compliance with §8(d). See International Union of Operating Engineers v. Dahlem Const. Co., 193 F2d 470, 473, et seq. (6th Cir., 1951).

[275] This position has been adopted by the Board. See International Metal Products Co., 104 NLRB 1076 (1953); Curtis Bros. Inc., 119 NLRB No. 33, 41 LRRM 1025, 1028 (1957).

[276] See Modine Mfg. Co. v. Grand Lodge Int. Assn. of Machinists, 216 F2d 326 (6th Cir., 1954) [Union A certified in 1948 had executed a contract embodying union-shop and check-off provisions. Prior to the expiration of that contract, the NLRB certified Union B as the representative of the bargaining unit involved. The Sixth Circuit recognized the district court's jurisdiction, under Section 301, to determine the right of the displaced union to enforce the provisions described above despite the fact that the contractual issue depended on the provisions of the LMRA governing the employer's duty to bargain and his related duties vis-a-vis a certified union.

[277] See American Seating Co., 106 NLRB 250, 254 (1954).

[278] See, e.g., Hershey Chocolate Corp., 121 NLRB No. 24, 42LRRM 1460 (1958), which modifies the NLRB's "schism" doctrine; Pacific Coast Ass'n. of Pulp and Paper Makers, 121 NLRB, No. 34, 42 LRRM 1477 (1958), modifying the term during which a long-term contract will operate to bar an election; Keystone Coat and Apron Towel Supply Co., 121 NLRB No. 125, 42 LRRM 1456 (1958), revising rules as to when an invalid security-arrangement will prevent a contract from constituting a bar.

[279] See Shea Chemical Corp., 121 NLRB No. 129, 42 LRRM 1487 (1958), modifying previous rules permitting an employer and an incumbent union to negotiate and execute a new contract despite a timely claim of a rival union which raises a "real question" of representation.

[280] See note 19 supra.

See also International Union, United Industrial Workers of America, Local No. 286 v. Star Products Co., 16 Ill. App. 2d 321, 148 NE2d 43 (Ill. App., 1st Dist. 1958). Plaintiff-union and the employer entered into a contract, including a check-off provision and apparently a union-security provision. Prior to the expiration of the contract, some members of the plaintiff union joined a rival union. The employer, without any certification of the rival by the NLRB, entered into a contract with the rival which was inconsistent with the plaintiff's unexpired contract. Plaintiff brought suit in the state court for a declaration that its contract was "valid from its inception" and for further appropriate relief. The trial court dismissed for want of jurisdiction. The appellate court in sustaining the judgment urged (1) the original validity of the contract depended on questions as to majority status and appropriate unit, which, it implied, were within the Board's exclusive competence; (2) the validity of the second and inconsistent contract depended on the application of §8a(5) of the LMRA and the application of the "schism doctrine"; since the continued force of the first contract also involved these issues, which were appropriate for Board determination, the trial court (semble) lacked jurisdiction; (3) as a result of the Board's, i.e., the Regional Director's, refusal to issue a complaint on the ground of "insufficient evidence" of statutory violations, the issues as to the validity of the first contract were *res judicata*.

It should be noted that the court's first ground would appear to destroy judicial competence under §301 unless the contracting union had been certified within a year of the execution of the contract relied on. But see Int. Broth. of Teamsters v. W. L. Mead, 230 F2d 576, 581-82 (Cir. 1, 1956), cert. denied 352 U. S. 802 (1956); see also *Westinghouse*, 348 U. S. at 451; ". . . in such actions [under Section 301] the validity of the agreement may be challenged on federal grounds —that the labor organization negotiating it was not the representative of the employees involved, or that subsequent changes in the representative status of the union have affected the continued validity of the agreement." (The supporting citation was: "Cf. *La Crosse Telephone Corp.* v. *Wisconsin Employment Relations Board*, 336 U. S. 18 [recognizing the Board's exclusive jurisdiction over representation questions]. Query: Does the "cf." imply judicial competence over such questions in the context of Section 301 actions?

The court's reliance on *res judicata* in *Star Products* appears to raise serious constitutional difficulties, which I have not adequately explored and which can only be mentioned here. Cf. dissent in Graybar Elec. Co. v. Automotive Petroleum and Allied Industries Employees Union, Local 618, 365 Mo. 753, 775, 287 S.W. 2d 794 (1956). The plaintiff's alleged contract rights are destroyed on the basis of an *ex parte* administrative investigation, in which neither the plaintiff nor anyone else is accorded the substance of a fair hearing. It is true that the plaintiff's interest in a statutory remedy may be destroyed by similar administrative determinations. But it does not follow that asserted contract rights, whose enforcement generally depends on the plaintiff's initiative, can be constitutionally destroyed in the same fashion.

Some courts faced with motions to stay arbitrations on the ground that the contracting union had not represented a majority have denied such motions, declaring that the issues are within the NLRB's exclusive jurisdiction and that the collective agreement is presumed to be valid until the Board makes a determination which invalidates it. See Matter of Levinsohn Corp., 299 N. Y. 454, 87 NE2d 510 (1949). Although the *Levinsohn* case was controlled by the Wagner Act, it has, without discussion, been followed despite the new problems raised by §301. See In re Wyatt Mfg. Co., 26 L. A. 171 (N. Y. Sup Ct. 1956).

[281] See Int. Bhd. of Teamsters v. W. L. Mead, 203 F2d 576,

581-82 (1st Cir., 1956), cert. denied, 352 U. S. 802 (1956).
[282] Courts, in exercising equity jurisdiction in Section 301 actions, will presumably apply conventional equitable doctrines under which relief may be withheld as a matter of discretion where an alternative remedy exists or where equitable relief may be nullified in another forum. Even though similar considerations enter into an application of "primary jurisdiction," the cannons of equity would appear to import considerably more flexibility.
[283] Cf. Hays, supra, note 1, at 978-79.

The Role of the State Supreme Court in the Adjudication of Federal Questions

By ALLISON DUNHAM
Professor of Law
The University of Chicago Law School

During the past five years hundreds of articles and speeches have been published concerning the United States Supreme Court. An analysis of these would show a rough division into four categories:

(1) Those articles and speeches which praise or deplore particular decisions of the Supreme Court with the author dealing with the merits of a particular controversy.

(2) Papers which approve or disapprove of particular decisions of the Supreme Court in terms of the decisions relation to distribution of power between state and nation.

(3) Papers which attack or defend the Supreme Court with the approving or disapproving generalization drawn, all too frequently, from one particular instance.

(4) Papers which try to describe the role of the Supreme Court in constitutional controversy and then try to induce the reader to appreciate the tasks and difficulties of decision.

I hope that my talk today fits somewhere in the fourth category of understanding and sympathy but with, I also hope, a peculiar twist, an appreciation of the role of the State Supreme Court in the adjudication of federal questions. Much of that which follows is elementary but it bears repeating.

The state judicial systems are in a unique position in our federal system. Historically and actually today the state court and the state legal system serves as the initial agency of government settlement of most problems of private behavior. Federally law has never operated fully in these matters. In general federal law does two things: (1) It sometimes displaces state law and takes over the task of governing private activity. Where ever the negative implication of the commerce clause of the constitution prohibits state regulation and where the interstate commerce act of congress supersedes state law are illustrations. (2) (and most often) federal law assumes and accepts the basic responsibility of the states and seeks only to regulate the exercise of state authority, usually by saying "do not" and rarely by command of action. The ex post facto clause and the 14th amendment are illustrations.

Thus the state judge is supreme in those areas where, for various reasons there is no applicable federal law. This supremacy may be emphasized by recalling that even if a question of state law gets into the federal court system in such a way that the United States Supreme Court must decide the question, the state supreme court is free to ignore the decision of the Supreme Court. We may also recall that a state court decision is reviewable by the Supreme Court only as to matters of federal law.

The unique position of the state judge is further emphasized when we recall that as to many matters of federal law, Congress has chosen to use the state courts as federal instruments to enforce federal law. But whether federal law is injected into the state judicial system because Congress has seen fit to leave such matters there, or is injected into the state system by way of defense to some state created right, the Supremacy Clause of the Constitution controls the state court action. That clause would seem to mean this: If a state court undertakes to adjudicate a controversy the state court must do so in accordance with whatever federal law is applicable. We need not consider here whether state courts can be compelled to adjudicate a matter. We may note however that in post conviction claims reviewed by the Supreme Court, the Court has frequently spoken of the obligation of the states to provide a court procedure to test and raise certain federal claims. Even so this obligation has been enforced to date only by the sanction of habeas corpus.

Before proceeding further certain premises from which I proceed should be made clear. Most of these are no longer debatable:

(1) Not since the first decades of the 19th century has it been seriously argued that the Supreme Court may not review a state court decision. I assume therefore that the Supreme Court may review a decision of a state court to determine whether the state court applied applicable federal law.

(2) It is essential to the maintenance of the federal union that there be some review of state action by some agency other than the national legislature and we agree that in our system it is and should be the Supreme Court.

(3) There are particular clauses of the constitution such as the full faith and credit clause, the import-export clause and the Fourteenth Amendment which have been held to be self-executing for too long a period of time to re-open this issue. Thus these clauses are enforceable by courts without further action by Congress.

(4) Judges do make law instead of finding it and implicit in Chief Justice Marshall's famous statement that it is a "Constitution which we are interpreting" is almost an obligation on the courts to keep the constitution a living document.

(5) The values of federalism over a completely national system are so self-evident that they need not be re-argued. I like as a relevant statement of these values, the remark of Professor Wechsler in celebrating the federal system a few years ago. "The enduring values of federalism," he said, "call upon a people to achieve a unity sufficient to resist their common perils and advance their common welfare, without sacrifice of their diversities and the creative energy to which diversity gives rise."

Although the subject matter of this session of the Conference is entitled "Federal-State Relations" I take it we are not discussing the whole of this complex subject but only to the extent this topic is within the special competence of judges, particularly state court judges. There is no doubt that the position of the states in our system has deteriorated. For our purposes this is a fact, the consequences of which must control state court judges however hateful this fact is to many of us. Some of the causes of this decline may be of interest to the state judiciary in order that we may properly distribute the blame for the decline of the states and also in order that we may understand some of the current attitudes, found even in the Supreme Court, toward the states.

Some causes of the decline of the state, such as the need to maintain safety against behavior of our international neighbors should lead us to conclude that neither judge, legislator or executive in either the federal or state system can be blamed for the decline of the state.

Another cause of the decline of the states cannot be made the responsibility of any federal official, particularly a judge of the United States Supreme Court. This cause is the unwillingness of the states to deal with problems which have been traditionally theirs. Unwillingness is too weak a word—eagerness that the federal government take over the job is more apt. Illustrative is the subject of the substantive criminal law. A subject more fit for state action could hardly be found. In recent years Congress has been asked, however, to create a growing list of federal crimes. In the beginning it was a federal crime to interfere with federal officials and federally operated institutions. Thus it is a federal crime to rob a post office. But then Congress made it a crime to rob a private institution such as a bank incorporated by act of Congress and finally Congress has been asked (and it has) to make it a crime to rob a state created bank if that bank has paid money into some federal fund such as the Federal Deposit Insurance Corporation. This principle, if there be one, of making a federal crime if the victim gets some favor from or contributes some money to the national government has not yet been fully exploited. Think of the business state law enforcement officers could turn over to J. Edgar Hoover if it became a federal crime to murder or rob a person who receives federal funds or who pays federal income taxes.

As state court judges you are not to blame for these state initiated requests that the federal government assume power. Neither is the Supreme Court to blame. It is also obvious that neither judiciary can do much about this decline of the states. The relevance of this kind of decline of state government to our problem lies perhaps in the attitude of mind which this assumption of power by the federal government encourages. As state court judges you have become concerned with the question when does federal law supersede state law. A paraphrase of a remark of Chief Justice Hughes concerning dissenting opinions might be apt here:

> "we ought not to expect among supreme court judges much greater respect for state power on the difficult question of federal supersedure which comes before the Supreme Court than we find among the representatives of the states such as Congressmen, Attorneys General, Prosecuting Attorneys and Chiefs of Police on the lesser issues of historic police regulation."

From the above recital of a few causes of the decline of state power we can make this generalization: Many of the factors leading to the increased exercise of power by the federal government are attributable not at all to the Supreme Court. A correlary of this statement is the fact that much of the problem is not solvable by the judiciary, either federal or state.

This statement that the solution of many of the federal-state problems is not in the hands of the judiciary should make us look at an area where the Supreme Court has expanded state power. It is well-

known that in most areas of governance of private activity, the Constitution does not block out responsibility for governance between state and nation. But we should not forget that at one time not so long ago, the Supreme Court held there were situations in which the mere existence of federal power deprived the states of competence to act. Since the constitutional revolution of the mid-thirties the Supreme Court has made it very clear that there are very few such situations left. Thus if we compare 1928 with 1958 the Supreme Court has made a substantial increase in the power of the states. There are wide areas of governance of private activity where state law operates by virtue of the non-exercise by Congress of its power to regulate private conduct.

The root of the current controversy concerning state or federal governance of private activity is Congress. Since Congress has discretion not to act, it has discretion to act for a limited purpose. When the federal government undertakes to regulate or govern private activity, there is inevitably a question whether such assumption of responsibility by Congress displaces the state law which formerly governed the private activity. This is a question which the Court must resolve. But Congress is the final tribunal of review in this area. A decision by the Supreme Court that state law has been displaced is really no final bar to state governance of the activity. If the political representatives of the states, in Congress assembled, think a decision wrong it can be changed. Whether any particular state law should be superseded by an act of Congress is not a matter of judicial concern. For the judiciary the only question is the test which the Supreme Court adcises should be used to determine whether state law has been displaced.

The area of federal-state relations which produces the most stresses and strains in the judicial systems is the area where federal law controls the exercise of admitted state authority. Although the Constitution appears to give Congress considerable power to control the exercise of state authority by legislation it has not seen fit to use this power extensively. Thus it is the Constitution as interpreted by the Supreme Court rather than statutory law which is the federal law applicable. One very substantial group of federal controls on state exercise of its admitted authority are the constitutional prohibitions designed to protect the private individual from state action thought to be abusive. The states may govern the private conduct but they must do so according to federal standards. The ex post facto clause, extradition clause, the bills of attainder clause and the Fourteenth Amendment are leading examples of this type of control. Here the federal law functions as a policeman of the decencies of civilized government. Since so much of this policing concerns the procedures in a particular case, part of the irritations arise from the fact that federal questions concerning the procedure cannot be known until final decision.

In the balance of this paper I will concern myself with what you as state court judges can do in the judicial system in preserving state power over private conduct against a claim that federal law has displaced it or against a claim that the state method of regulation has infringed on federal standards. Your oath of office under your state constitution and the Supremacy Clause under the Federal Constitution require you to heed the Supreme Court in these matters.

It seems to me that the crux of the proper approach for the state judiciary lies in emphasizing the values of federalism which I quoted earlier – the value of experimentation and diversity among the states. You may recall that this justification for federalism was advanced in the days of Mr. Justice Brandeis as a reason why the Supreme Court should allow state legislatures to regulate economic enterprise as they chose to. The enduring value of federalism is not, however, the fact of diversity or lack of uniformity but it is the privilege to choose to be different. The legislative process requires that choice to be made when legislation is enacted. Choice, as you know, is not made in the same way in a judicial decision. The common law tradition of continuity through precedent and custom influence a decision which must be made. I read the current Supreme Court opinions in this general area to do two things: The Court is still receptive to this argument of diversity; but it is requiring the state supreme courts to give careful consideration of every old rule to demonstrate that choice was conscious.

Professor Allen's monograph for this conference on state criminal procedure and federalism points out that one really significant fact derivable from a survey of Supreme Court cases involving criminal procedure is the number of specific instances in which the states were allowed to keep or adopt a procedure which deviates from a federal norm. One additional fact is the number of times the Supreme Court, even after it has indicated a federal norm, has allowed a state to have a diverse rule where the state judiciary has done its job well.

You are of course aware of this in many areas of federal law. In passing upon a city's refusal to permit the members of a religious sect to speak in a public place, I doubt that many of you would uphold the city's power by a decision which recites only Justice Holmes aphorism of 1895 that because the city owns its parks it has a proprietor's right of exclusion. You would, I am confident, look to the facts of the

particular refusal, consider the reasons the city authorities have for refusal and you would balance legitimate interests of the city against the interests of free speech. You know, I think, that if you did this well and still upheld the city's refusal your chances of being sustained are extremely high. Take another Holmes aphorism of current interest. In considering the oaths and investigations of government employees for subversive or disloyal indications. I doubt that many of you would find a complete vindication of state power in Holmes' remark that while there is a constitutional right to talk politics there is none to be a policeman. If you balanced individual rights against legitimate state concern, you would be sustained. The lesson of the Supreme Court cases seems to be this: old slogans and aphorisms cannot serve as a substitute for judgment by you. If you consciously make that judgment, respect for the federal system will tend to induce the court to support you.

This, it seems to me, is the lesson of Konigsberg v. State Bar of California 353 U. S. 252 (1957) on the one hand and Beilan v. Board of Education 357 U. S. 399 (1958) on the other. In the former case, it appears to me, the Supreme Court of California relied on tradition—admission to the bar is in the uncontrolled discretion of the state procedure for admission. It did not consider the case other than routine. The Supreme Court was thus able without hindrance from any opinion or clearly articulated state reasons for failure to admit Konigsburg, to read the record as it desired and to find the alleged reason for non-admission to be illegal inferences from refusal to answer. In the Beilan case on the other hand, the Supreme Court of Pennsylvania noted that the record showed no inferences were drawn from refusal to answer and it concluded that the reason for discharge of the teacher was refusal to answer relevant questions. The Pennsylvania Supreme Court forced the United States Supreme Court to ask itself only one question: can a state if it wishes refuse employment to a person who refuses to answer a relevant question. Bar Admission cases before and after Konigsburg indicate that if the state supreme court explains why it regards refusal to answer as important and makes clear the legitimate state interest, the Supreme Court will respect the state's desire to be different.

The history of post conviction claims in Illinois also indicates an approach for the state judiciary. In a fair procedure case, the Supreme Court cases indicate that there are several requisites before the merits are reached: (1) an adequate state procedure for the claimant to make his claim; (2) a full and serious and thoughtful consideration of the claim; (3) a careful statement of the facts as the state court sees them. Here the important thing for the State Supreme Court is to convey to Washington an idea of the state's sufficiency to maintain orderly procedure and to control its government. If this is indicated, the chance of Supreme Court reversal in any particular case is reduced.

When we depart from those aspects of federal law which protect the individual against the methods chosen by the state and turn to the question whether federal governance has displaced state governance I am less confident of any approach being successful. It seems to me that a true adherence to the federal system requires the burden of persuasion to be placed on those asserting federal supersedure. On the other hand we can live under a reverse presumption without too much damage to the federal system. The recent Supreme Court decisions have destroyed the presumption of earleir days but I do not see that they have substituted the opposite. It would seem to me to be incumbent on the state judiciary now to show the large number of state interests and ends which are served by the state law to strengthen an inference that it was inconceivable that Congress intended to displace the state law. Even after Nelson the court indicated that the states have such a major interest in subversion that they can continue to have subversion laws. Mistakes in this area are less serious than in the other area under discussion because they are completely changeable by specific legislation. Indeed it is possible to establish by legislation a rule of construction.

An examination of recent federal regulatory legislation would seem to indicate that in spite of the furor about this problem consciousness of it has not yet reached the level of the legislative draftsman. Since legislative action is possible the question arises whether the organized state bench can do something in this area? It would seem to me to be beyond the province of the state bench to report and recommend on two aspects of the general problem: (1) whether there should be federal regulation of the private conduct; and (2) Assuming there should be whether federal law should or should not displace state law. The most a committee of judges could do would, it seems to me, be to inform Congress of legislation or rules which might be affected by the federal law. In a more general way a Committee of State court judges could perhaps draft one or more model clauses concerning displacement which Congress would be urged to use in new legislation. This would be analogous to the traditional repealer and separability clauses found in most legislation.

My discussion today has not tried to deal with the problem of federal-state relations but rather I have

tried to look at the problem through the eyes of a judge. Most cases (all cases of displacement) do not really impose a final bar to state action. In all such cases I have suggested that the solution of any particular problem is for another side of our federal system – the federal officials who are elected by the states. From the judiciary's point of view we should not lose sight of the premise that the federal system cannot be maintained in any form without a supreme court empowered to determine when federal law does govern a situation. Within that framework, the state judiciary can strengthen the federal system and its valuable chance of diversity by the judiciary first deciding whether their state needs diversity and explaining why to the Supreme Court. True it is that there is a minimum of uniformity which our constitutional framework imposes on each of the states. Beyond that, imaginative and creative state law making on your part will most likely give you the values of independence and diversity.

The Distribution of Judicial Power Between National and State Courts

By PHILIP B. KURLAND
Professor of Law
The University of Chicago Law School

[*Speech delivered at the Tenth Annual Meeting of the Conference of Chief Justices, August 20, 1958.*]

From time to time during the past fifteen years, I have appeared before gentlemen of your ilk in vain attempts to persuade you that you should act in accordance with the best interests of my clients. My singular lack of success has not discouraged me from continuing to try to show you the light of truth and justice. And so I appear before you this morning once again in the role of an advocate. For I am asking you to give consideration to—and then take action on—the question of the appropriate distribution of power between the national and state courts.

The first point I wish to make is that the question of distribution of judicial power between the national and state governments is almost entirely in the hands of the national legislature. With the single exception of the Supreme Court's original jurisdiction, the Constitution of the United States does not make any provision for a division of function between the two judicial systems. There was some debate at the Constitutional Convention on the question whether there should be any federal courts at all, other than the Supreme Court. But that question was left to Congress for resolution. And, although Mr. Justice Story once announced the view that all of the judicial powers specified in Article III of the Constitution must be vested in federal courts,[1] and some professors are still of that view,[2] Story's notion has long since been rejected both by Congress and by the courts. In the very first judiciary act,[3] the act which authorized the creation of the federal courts, only a small portion of the Article III powers was vested in them. Moreover, not only does Congress have power to say what business shall be assigned to the federal courts. It may also decide that the state courts are to be charged with the effectuation of federal law.[4] Indeed the general rule has developed that unless Congress specifically confines jurisdiction to the federal courts, that jurisdiction is to be exercised by the state courts as well.[5]

My second proposition is that the state judiciaries have a direct interest in the content of the federal judiciary acts, even where the act does not purport to assign jurisdiction to state courts. A single example will suffice to make this point. Just a few weeks ago, the President of the United States signed into law a bill which increases the minimal monetary amount required to invoke jurisdiction in the federal district courts from a sum in excess of $3,000 to a sum exceeding $10,000, both with regard to diversity of citizenship cases and federal question cases.[6] That law also provides that in measuring diversity of citizenship a corporation shall be deemed to be a citizen of the state in which it maintains its principal place of business as well as of the place of its incorporation.[7] The law also prohibits removal from state to federal courts of workmen's compensation cases.[8] The bill was sponsored by the Judicial Conference of the United States in order to relieve the federal courts of a portion of their workload.[9] It was an intermediate step toward the possible elimination of diversity jurisdiction in its entirety.[10] If, as suggested, this act will relieve the federal courts of as much as 12½% of their diversity business, the effect on the state courts will be to increase their burden by some 3,000 cases per year. And the heaviest increase will take place in those metropolitan areas of the country where the state courts are already floundering under a burden which they cannot effectively carry. Should the Judicial Conference later recommend and Congress enact legislation eliminating diversity jurisdiction in its entirety, there will be an increase in the business of the state courts by at least 23,000 cases per year.[11] This is a graphic but not unique example of the fact that one cannot properly consider the problems of federal court jurisdiction in isolation from the effect that changes in that jurisdiction will have on the state judicial systems. Yet I venture to say that there was no representation before the Judiciary Committees of Congress by anyone who suggested that the states too had a vital interest in the legislation.

Lest this statement mislead you as to my own thinking on this subject, let me say that I am heartily in favor of the abolition of the diversity jurisdiction. But I do not believe that this major shift of business from the federal to the state courts should take place without a complete reallocation of the country's judicial business. This reallocation requires a careful study of the proper assignment of judicial power within the nation. And my thesis for today is that such a study should be undertaken not only by those whose interest is solely that of the federal judicial system, but rather by a group which can also represent the interests of the state judiciaries. In short, I suggest that it is this Conference of Chief Justices—working with the Judicial Conference of the United States, if possible—which

should undertake to prepare a revision of the Judicial Code of the United States for presentation to Congress. I can assure you that such an undertaking could have the assistance of major law schools of the country and I expect that the American and state bar associations could also be called upon for aid if that were thought necessary or desirable.

But let me return, if I may, to the point of my digression.

My third point is that reconsideration of the distribution of judicial power between states and nation is both necessary and long overdue.

We have it on high authority that:

> "It is proper to inquire into the appropriateness of the existing distribution of judicial power, just as the substance of law is revised from time to time in response to new needs. Whatever survives such an inquiry can only help to strengthen the judicial system. . . . The happy relations of states to nations—our abiding political problem—is in no small measure dependent upon the wisdom with which the scope and limits of the federal courts are determined."[12]

Indeed, it was thirty years ago when Professor Frankfurter, as he then was, noted that there had not been a comprehensive revision of the federal judicial code since 1875. What was true in 1928 remains true in 1958: The distribution of function between the two sets of judiciaries remains controlled by the concepts of eighty-odd years ago. And as Professor Frankfurter wrote:

> "A division of judicial labor among different courts, particularly between a dual system of federal and state courts, is especially subject to the shifting needs of time and circumstance. That the wisdom of 1875 is the exact measure of wisdom for today is most unlikely."[13]

In 1875, the national government was truly a government of limited functions. Interstate commerce was a narrow area, just beginning to burgeon; foreign relations were a comparatively minor aspect of governmental affairs; the income tax was not so pervasive a feature of our life; federal criminal regulation was minimal; national welfare legislation was practically unknown. And distance between federal courts had not yet evaporated in the face of the auto and the plane. Whether we like it or not the shift in the exercise of substantive governmental power from the states to the nation has been a vast one. And the time has come to adapt the judicial systems to the realities of 1958.

I do not mean to suggest that there have been no changes in the judicial code since 1875, for there certainly have. But that code has developed like Topsy—it has just growed—with the result that there is in it today no rhyme and an inadequacy of reason.

Having pointed out that the problem of allocation of judicial power between the states and the nation is a legislative one, that the states have a vital interest in this legislative allocation, and that a reconsideration of the division has long been overdue, I should like to call your attention to several—four to be exact—of the many problems which would be presented by such a reconsideration.

I have already made reference to the diversity of citizenship jurisdiction of the federal courts. It amounts to approximately 33 percent of the business of those courts. And yet since 1938 when Mr. Justice Brandeis announced the opinion for the Court in *Erie R. R.* v. *Tompkins*,[14] the federal courts in these cases have been vainly trying to simulate state courts presented with the same questions. As the Supreme Court said in *Guaranty Trust* v. *York*,[15] in diversity cases the federal courts are to behave as though they were part of the state court system. This raises the question whether there is any reason for making available to litigants this simulated version of a state court when the real thing is available to them "across the street". My own opinion, as I have already stated, is that little, if any, reason exists today for the continuance of diversity jurisdiction. Certainly the question ought to be examined and, I repeat, examined not only by the Judicial Conference of the United States but also by some group with a real interest in the state judicial systems.

A second major question calling for study, it seems to me, is whether the federal question jurisdiction should remain in the state courts. There are no statistics available to show how much of the state court business is concerned with cases in which the plaintiffs are relying on federally created rights as a basis for their claims. But you know even better than I that those cases add up to a very substantial number. Are there adequate reasons for leaving these cases for resolution by the state courts?

Two reasons which have been advanced are weighty. As Professor Wechsler has told us:

> "This method has the virtue of preserving for final resolution by state agencies any issues in the case that turn upon state law; the more numerous or weightier such state ingredients, the more important it may be to have them first determined by state courts. Initial state adjudication also tends, however, to give the states the final voice on many federal questions, for review by the Supreme Court, even when the parties can afford it, can never function on a quantitative basis."[16]

Another suggestion is, to me, no longer persuasive. Mr. Justice Frankfurter to the contrary notwithstanding, I do not believe that it is any longer possible that "the federal courts should be given only such powers as are appropriate to a national judiciary under a federal system, so limited as to be capable of disposition by a relatively small number of distinguished judges."[17] The state courts ought not to be the dumping ground for litigation on the pretext of maintaining an elite federal judiciary, since time has demonstrated that whatever "elite" quality the federal judiciary once attained has long since been dissipated. I do not mean to foreclose the question, however, but only to ask for its re-examination—by you.

No matter how these major issues are resolved there remains a third major problem involving the whole area of cooperation between the two systems, a problem which has never been adequately canvassed. However the federal question and diversity jurisdictions are allocated there will always be cases arising within one system which will call for the application of rules of law developed by the other. And often those rules will be difficult to ascertain. Some method of certification of questions from one system to the other, such as is authorized by a Florida statute,[18] is certainly worth consideration before its feasibility is rejected out of hand. Certainly the existent methods of dealing with this problem have proved both difficult and inefficient.[19]

The fourth example which I should like to mention is the one which is the most exacerbating in the whole area of federal-state judicial relations: the power of a court in one system to enjoin parties from proceeding with litigation in the other. As you know, the Judicial Code now provides that:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly provided by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."[20]

The very real question presented by this language is whether the exceptions eat up the rule. In 1941, the Supreme Court, in *Toucey* v. *New York Life Ins. Co.*,[21] construed very narrowly the powers of the federal courts to enjoin proceedings in the state courts. But the 1948 codification specifically rejected the *Toucey* rationale [22] and, in effect, reopened the whole question. I will venture that this action too, was taken without any representations having been made to Congress on behalf of the state judicial systems. Here again, I submit, is an area which warrants careful consideration by your organization.

The problems suggested here are but some of the details which are regulated by the Judicial Code of the United States. As we have been told, problems such as these "do not yield to settlement by formula. Nor are they moral issues to be tested by abiding truths. . . . We are here in the domain of administrative effectiveness and procedural adaptations,—matters not of principle but of wise expediency."[23] And I submit that the wisdom and experience of the state judiciaries should be lent to their solution.

I have spoken of some of the issues which must be the concern of those engaged in determining the proper allocation of judicial power between state and nation. I wish now to speak for a moment about one subject which should not be the object of such concern: I mean the scope of the appellate jurisdiction of the Supreme Court. I speak of this in part because of the recent furor raised in Congress over this subject.

I start with an assumption in which, I believe, you will readily indulge me. That is that the Supreme Court has erred, seriously and frequently, in its decisions of recent terms. But I would remind you that this is no novelty with reference to that Court or any court. For me there are proper and improper means for correcting the Supreme Court's errors, and a vindictive limitation of the Court's appellate jurisdiction would be a grosser error than any which the Court has committed. Insofar as it is within the competence of Congress to rewrite the law which the Court has "erroneously" interpreted, such revision is a proper way to correct judicial error. This was done, it will be recalled, after the Court held insurance to be a business subject to the anti-trust laws;[24] it was done again after the Court held that the off-shore oil lands were within federal rather than state control.[25] Insofar as the "error" was an error of constitutional construction rather than one within the legislative domain, there are still other means of correction. Constitutional amendment is available and has been used to correct judicial error, as was the case with the Income Tax Amendment.[26] Education of the people and the Court to the error of its ways is still another corrective and we have seen this work as on the question whether the federal government had power to prohibit the shipment of articles manufactured by child labor in interstate commerce.[27] But to toy with the idea of cutting down the Court's appellate jurisdiction—especially in constitutional matters—is to toy with the destruction of that organ of our governmental system which has permitted the United States to survive as a federation.

It was Mr. Justice Holmes who long ago said that "the Union would be imperilled" if the Court was deprived of its power to declare "the laws of the several states" invalid.[28] It was Harlan Fiske Stone, then Attorney General of the United States who said:

"The most enlightened thinkers of the day urge upon the world the submission of international controversies and the interpretation of treaties to a permanent judicial tribunal, as a substitute for the arbitrament of arms. It would be a strange anomaly if at this day the settlement of differences between our two systems of government should be withdrawn from the Supreme Court and either left unsettled or settled according to arbitrary determination of the agencies of the respective governments."[29]

But I really want to quote to you the words of one who is perhaps closer to your own thought on this subject. Senator Butler of Maryland, sponsoring an amendment to the Constitution of the United States had this to say only four years ago:

"The final section which would remove from Congress the power to impair in constitutional cases, the appellate jurisdiction of the Supreme Court, finds its principal justification in the fact that Congress can now withdraw jurisdiction as was done in the cases of *Ex parte McCardle*, the 1869 habeas corpus case with which I am sure you are all familiar, and as was attempted in *Ex parte Yerger*, an 1868 case which prompted Congress to introduce a bill prohibiting the Supreme Court from considering any case which involved the validity of the Reconstruction Acts and another prohibiting judicial review of any acts of Congress. To the extent that appellate jurisdiction on constitutional questions is taken away from the Supreme Court, decisions of State and lower federal courts on such constitutional questions will have a finality and stature which they do not now and never were intended to possess under our judicial system. . . .

"To me that is a serious matter. It can happen again. We may not foresee the circumstances under which it may happen, but I do not believe we should place the American people under that hazard. We should guarantee to them, by their Constitution, protection of their basic right to be heard by the Supreme Court of the United States in all cases arising under the Constitution, and we should do what we can to preserve our system of checks and balances. Both of these ends would be served by this section of the joint resolution."[30]

I should hope that you would indorse these sentiments of Senator Butler.

In conclusion, I want to say this in support of my plea that you undertake to study the federal code and make suggestions to Congress for the proper distribution of judicial power. The centralization of governmental power in this country has come about primarily for three reasons. The first is the necessity for central power resulting from the increased interdependence of the people within this nation and within the world community. The second is the unwarranted usurpation of power by the federal authorities in many areas. The third is the unwillingness of the states to shoulder the responsibilities which are properly theirs.[31] If the existent distribution of judicial power is unfortunate in many respects, it is due in part to the failure of the state judiciaries to make their voices heard on the subject of the allocation. The responsibility is yours and I hope that you will exercise it.

FOOTNOTES

[1] Martin v. Hunter's Lessee, 1 Wheat. 304 (1816).

[2] My colleague Professor Crosskey is one of those who holds the view that Story's interpretation of Article III is the correct one. See 2 Crosskey, Politics and the Constitution 808 *et seq.* (1953). Professor Henry Hart is of the opinion that there is some constitutional minimum below which the federal courts' jurisdiction may not be reduced. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectric, 66 Harv. L. Rev. 1362 (1953). And Professor Pritchett believes that there is a constitutional barrier to reducing the Supreme Court's appellate jurisdiction. See Pritchett, The Political Offender and the Warren Court 65-69 (1958).

[3] Act of September 24, 1789. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923).

[4] See Testa v. Katt, 330 U. S. 386 (1947.)

[5] See Claflin v. Houseman, 93 U. S. 130 (1876).

[6] 28 U. S. C. §1331 (a) has been amended to read:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U. S. C. §1332 (a) has been amended to read:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between—

"(1) citizens of different States;

"(2) citizens of a State, and foreign states or citizens or subjects thereof; and

"(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

[7] 28 U. S. C. §1332 has also been amended by the addition of paragraph (c):

"(c) For purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

[8] 28 U. S. C. §1445 has been amended by the addition of paragraph (c):

"(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States."

[9] See Annual Report of the Proceedings of the Judicial Conference of the United States 275 (1958).

[10] Ibid.

[11] The exact number for fiscal 1957 was 23,223, an increase of some 2,700 cases over the previous year. Id. at 175.
[12] Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Corn. L. Q. 499, 500 (1928).
[13] Id. at 503.
[14] 304 U. S. 64 (1938).
[15] 326 U. S. 99, 109-110 (1945).
[16] Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 Law and Contemp. Prob. 216, 218 (1948). Evidence of the truth of Professor Wechsler's statement about the numerical insignificance of Supreme Court review of state cases may be found in the following statistics, which I have garnered from the annual surveys of the business of the United States Supreme Court in the *Harvard Law Review*.

Table I

CASES FROM STATE COURTS IN WHICH REVIEW WAS SOUGHT IN THE UNITED STATES SUPREME COURT AND THEIR DISPOSITION.
October Terms 1948-1956

		DISPOSITION				
Term	Denied	Dismissed	Vacated	Reversed	Affirmed	Total
1956	531	63	10	20	10	634
1955	523	72	5	11	13	624
1954	492	55	1	15	5	568
1953	512	39	3	18	13	585
1952	414	29	1	14	17	475
1951	354	48	9	13	12	436
1950	371	40	6	16	14	447
1949	398	40	1	13	18	470
1948	421	46	11	21	27	526

Table II

STATE COURT JUDGMENTS AFFIRMED OR REVERSED BY THE UNITED STATES SUPREME COURT.
October Terms 1948-1956

Term	1956	1955	1954	1953	1952	1951	1950	1949	1948
Percent	4.73	3.86	3.51	5.32	6.53	5.73	6.71	6.60	9.11
Number	30	24	20	31	31	25	30	31	48

Table III

STATE COURT JUDGMENTS REVERSED BY THE UNITED STATES SUPREME COURT.
October Terms 1948-1956

Term	1956	1955	1954	1953	1952	1951	1950	1949	1948
Percent	3.15	1.76	2.64	3.08	3.16	3.00	3.50	2.79	4.00
Number	20	11	15	18	14	13	16	13	21

[17] Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Corn. L. Q. 499, 530 (1928).
[18] Fla. Stat. Ann. 25.031 (Supp. 1956); see Kurland, Mr. Justice Frankfurter, The Supreme Court, and the Erie Doctrine in Diversity Cases, 67 Yale L. J. 187, 214 (1957).
[19] See, e.g., the litigation culminating in Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602 (1951), which was in the courts for almost a decade shuttling back and forth between the two judicial systems.
[20] 28 U. S. C. §2283.
[21] 314 U. S. 118 (1941).
[22] See Moore, Commentary on the United States Judicial Code 400-402 (1949).
[23] Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Corn. L. Q. 499, 506 (1928).
[24] See United States v. South Eastern Underwriters Assoc., 322 U. S. 533 (1944); Prudential Insurance Co. v. Benjamin, 328 U. S. 408 (1946).
[25] See United States v. Texas, 339 U. S. 707 (1950); United States v. California, 332 U. S. 191 (1947); 67 Stat. 29 (1953), 43 U. S. C. §130 et seq.
[26] See Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 158 U. S. 601 (1895); Sixteenth Amendment to the Constitution of the United States.
[27] See Hammer v. Dagenhart, 247 U. S. 251 (1918); United States v. Darby, 312 U. S. 100 (1941).
[28] Holmes, Collected Legal Papers 296 (1920).
[29] Stone, Law and Its Administration 138 (1924).
[30] Hearings before Subcommittee No. 4 of the Committee of the Judiciary of the House of Representatives on the Composition and Jurisdiction of the Supreme Court, 83d Cong. 2d Sess. (June 23, 1954).
[31] See Kurland, The Supreme Court and the Attrition of State Power, 10 Stanford L. Rev. 274, 280-285 (1958).

THE LAW SCHOOL

THE UNIVERSITY OF CHICAGO